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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

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AMERICAN STATE REPORTS.
VOLUME 119.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

NAPIER v. ELLIOTT.

[146 Ala. 213, 40 South. 752.]

CONVEYANCE.—Delivery is a Necessary Incident to the execution of deed, without which it cannot take effect. (p. 18.)

CONVEYANCE.—Registration is not Conclusive Evidence of Delivery, but may be rebutted. (p. 18.)

CONVEYANCE.—Delivery Rests on Intention and is to be Collected from all the acts and declarations of the parties having relation to it. (p. 18.)

CONVEYANCE—Delivery.—Declarations of the Grantor at the Signing and Acknowledgment of a Deed explanatory of his subsequent act in procuring its registration are competent evidence on the question of delivery. (p. 18.)

Ejectment. Both parties claimed under one Hughes, plaintiff as his grantee and the defendants as his heirs. The conveyance to the plaintiff, after being signed and acknowledged by the grantor, was filed by him in the probate office and recorded, but was taken from it by him and placed among his other papers at his home. He continued, during his lifetime, in the possession of the land described in the conveyance. The defendants offered to prove declarations by the grantor at the time he signed and acknowledged the conveyance that he had been sued for a security debt, and wanted to make the conveyance and have it recorded, and then to put it away in his trunk not to be delivered, but so that his grantees could claim the property in case it was attempted to be sold in payment of any judgment upon the security debt. This evidence was, on the objection of the plaintiff, excluded.

Espy & Farmer, for the appellant.

Reid & Hill, for the appellee.

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215 DENSON, J. The only question presented by this record for determination is whether or not declarations of a grantor made at the time he signs and acknowledges a deed are competent to be given in evidence on the question of delivery, *vel non*, of the deed. Delivery is a necessary incident to the due execution of a deed. Without delivery it can never take effect. The record in this case shows there was no actual delivery; that the deeds were deposited by the grantor with the probate judge to be recorded, soon after they were signed; and after they were recorded they were returned to the possession of the grantor. He remained in possession of the lands until his death, and after his death the deeds were found in his trunk amongst his other papers, and were never in possession of the grantees.

Registration is not conclusive evidence of delivery, but it may be rebutted by other evidence: 1 Devlin on Deeds, sec. 292, and authorities cited in notes 4 and 5; *Alexander v. Alexander*, 71 Ala. 295; *Ellsberry v. Boykin*, 65 Ala. 336; *Wells v. American Mortgage Co.*, 109 Ala. 430, 20 South. 136; *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22, 30 South. 466; *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500, 133 Ala. 242, 31 South. 940; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82, 13 South. 570, 22 L. R. A. 297; *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478.

It is settled law that the fact of delivery rests in intention, and it is to be collected from all the acts and declarations **216** of the parties, having relation to it: *Boykin v. Smith*, 65 Ala. 294; *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500. This being true, it would seem to follow that declarations of the grantor, made contemporaneously with the signing and acknowledgment of the deed and explanatory of the subsequent act of the grantor in having the deeds spread on the record, would be competent on the disputed question of delivery: *Gregory v. Walker*, 38 Ala. 26; *McLure v. Colelough*, 17 Ala. 89; *Law v. Law*, 83 Ala. 432, 3 South. 752; 2 Wharton on Evidence, 2d ed., sec. 930.

On the facts disclosed by the record we are of the opinion that the court erred in not allowing the defendants to offer evidence of the declarations of the grantor. The case is distinguishable from that of *Williams v. Higgins*, 69 Ala. 517. There the deed was delivered to the grantee.

The judgment of the circuit court must be reversed, and the cause remanded.

Haralson, Dowdell and Anderson, JJ., concur.

What Constitutes a Delivery of a Deed is the subject of a note to *Brown v. Westerfield*, 53 Am. St. Rep. 537. The record of a deed is prima facie evidence of its delivery, and whoever questions this must assume the burden of proving that it was not delivered: *Dewitt v. Shea*, 203 Ill. 391, 96 Am. St. Rep. 311; *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22; *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161; *Holmes v. McDonald*, 119 Mich. 563. 75 Am. St. Rep. 430.

PELHAM v. CHATTAHOOCHEE GROCERY COMPANY.

[146 Ala. 216, 41 South. 12.]

RESCISSION of Sale of Chattels, Condition Required to Support.—To authorize a rescission of the sale of chattels on the ground of fraud on the part of the vendee so that a recovery in detinue or trover can be supported, these things must be proved: 1. The purchaser must, at the time of the transaction, be insolvent or in failing circumstances; 2. The purchaser must have had either a preconceived design not to pay for the goods, or no reasonable expectation of being able to pay for them; 3. He must have intentionally concealed these facts or made a fraudulent representation in regard to them; 4. The sale must have been induced by the fraudulent representation or concealment. (p. 22.)

RESCISSION—Burden of Proof.—To sustain the rescission of a sale of goods on the ground of fraud on the part of the vendee, the seller must assume the burden of reasonably satisfying the jury of each of the requirements necessary to support the rescission. (p. 22.)

RESCISSION OF SALE—Subvendee, What must do to Prevent. Where a plaintiff seeking to recover goods sold by him offers evidence prima facie sufficient to authorize him to rescind the sale, a subvendee must assume the burden of proof that he purchased from the original vendee and paid value. (p. 22.)

PURCHASER FOR VALUE, Who is.—One who has paid in cash, in whole or in part, or taken property in payment of a debt, is a purchaser for value entitling him to resist the recovery of property on the ground that the original vendor is entitled to rescind the sale for fraud. (p. 22.)

RESCISSION, Subvendee, When cannot Resist.—If a subvendee receives the property in secret trust for the original purchaser, such subvendee cannot resist the rescission of the original sale except on the same grounds that the original purchaser could have resisted it. (p. 22.)

RESCISSION—Burden of Proof Respecting Notice of the Fraud. If a subvendee resists a recovery by the original vendor on the ground that he is entitled to rescind the original sale for fraud, and

proves that he purchased from the original vendee for value, the first vendor must assume the burden of proving that the subvendee, before he paid the consideration, had notice of the fraud or knowledge of facts putting him on inquiry, which, if diligently pursued, would have brought him to the knowledge of the plaintiff's claim. (p. 23.)

RESCISSION of Sale for Fraud—Rights of Subvendees, When not Dependent on the Amount of the Consideration Paid by Them.—If, in a suit by a vendor of property to recover it from a subvendee, the latter shows that he purchased for value, the amount paid by him is not material, provided he parts with a consideration of some value as distinguished from a merely good consideration. (p. 23.)

RESCISSION of Sale on Account of Fraud.—Where there has been a regular course of business dealings between a vendor and his vendee consisting of sales of merchandise, and the former seeks to recover the property from a subvendee on the ground that the original sales have been rescinded for fraud, and there is no evidence to show under which purchase the property sought to be recovered was included, it becomes necessary for the plaintiff to prove that he was entitled to rescind each and every purchase for fraud. (p. 25.)

RESCISSION OF SALE, Right of not Waived by Demand for Payment.—If a vendor is entitled to rescind a sale for fraud, he does not waive his right to so rescind by demanding the payment of the purchase price. (p. 26.)

Detinue by the Chattahoochee Grocery Company against the defendant Pelham based upon the plaintiff's claim that the goods were purchased of him by C. W. Reeves, and that the plaintiff was entitled to rescind the sale for fraud. The judge orally instructed the jury that if they were reasonably satisfied from the evidence that at the time Reeves purchased the goods he had no reasonable expectation of being able to pay for them, and did not intend to do so, this was a fraud on the plaintiff entitling him to rescind the sale and reclaim the goods without reference to the solvency or insolvency of Reeves. The plaintiff requested the court to give in writing the following charges:

“(1) The court charges the jury that, if they believe from the evidence that at the time of the purchase from the plaintiff C. W. Reeves was insolvent; or in failing circumstances, and if you further find that said Reeves knew at the time he was insolvent and could not as a reasonable man expect to pay, or that he was insolvent and intended not to pay, and did not disclose these facts, then the plaintiff is entitled to recover, unless the evidence reasonably satisfies your mind that Pelham was a bona fide purchaser without notice. . . . (3) The court charges the jury that an intentional concealment on the part of Reeves of his insolvency or financial condition is per se fraudulent, and that if they are rea-

sonably satisfied from all the evidence that Reeves intentionally concealed his financial condition at the time of his purchase of the goods from plaintiff, and was in failing circumstances, and had no just expectation of paying for the goods, then you must find for the plaintiff, unless you are reasonably satisfied from the evidence that Pelham was a bona fide purchaser and without notice of such insolvency or of plaintiff's claim. (4) The court charges the jury that the intent to pay, in the absence of a reasonable expectation so to do, will not prevent rescission, if Reeves was insolvent or in failing circumstances at the time of the purchase, and if Pelham was not a purchaser for value of the goods in controversy. . . . (10) The court charges the jury that if from the evidence they find that the purchase by Reeves was fraudulent, then the burden is upon Pelham to reasonably satisfy you that he paid value for the goods."

W. O. Mulkley, for the appellant.

W. L. Lee and C. D. Carmichael, for the appellee.

219 **WEAKLEY, C. J.** The action is detinue, to recover divers articles of merchandise such as may usually be found for sale in a grocery store. The plaintiff prevailed in the court below as to all the goods sued for, and the defendant appeals. The claim of the plaintiff was rested on the contention that such fraud was committed by one Reeves, the original vendee, in the purchase of the goods, that as vendor it had the right to rescind the sale and reclaim the goods. The defendant resisted a recovery upon the claim that the proof did not satisfactorily establish fraud in the purchase, or, if it did, that he was a purchaser for value without notice either of the fraud or of facts sufficient to put him on inquiry, which, if prosecuted, would have given him such notice. The rules **220** of law which apply in a case of this kind—a controversy between a vendor seeking to reclaim goods and an alleged subvendee, claiming to be an innocent purchaser for value without notice—have been announced by this court in a series of cases which seem to plainly settle the law on the subject and to indicate the scope and nature of the inquiry. These cases also furnish a sufficient guide as to the burden of proof, and its shifting from one side to the other, as the jury, in consideration of evidence tending to support the one party or the other, passes from issue to issue in reaching a

conclusion upon the facts. As the principles settled by our previous decisions were not observed upon the trial, we will announce the rules which, under the tendencies of the evidence in this case, should be held steadily in mind by the court when admitting evidence or delivering instructions to the jury.

To authorize the rescission of a sale of chattels on the ground of fraud on the part of the vendee, so that a recovery may be had in detinue or trover against the first purchaser or subpurchaser, these conditions or facts must be combined: 1. The purchaser must, at the time of the transaction, have been insolvent or in failing circumstances; 2. The first purchaser must have had either a preconceived design not to pay for the goods or no reasonable expectation of being able to pay for them; 3. The purchaser must have intentionally concealed these facts or made a fraudulent representation in regard to them; 4. The sale must have been induced by the fraudulent representation or concealment. And the burden of proof, in the first instance, rests upon the plaintiff to reasonably satisfy the jury of the existence of each of the foregoing requirements. If a plaintiff fails to carry this burden in any of the four particulars, a recovery cannot be had, either against the original vendee or another claiming under him, whether a bona fide or a mala fide purchaser, or even a stranger. If the evidence reasonably satisfies the jury of the existence of each of the essentials above stated, it is incumbent upon one claiming to be subvendee to show that he is in fact a purchaser from the original vendee, and that he paid ²²¹ value for the goods; and whether he paid cash, in whole or in part, for the chattels, or took them in payment of a debt due to him from his debtor, he would be a purchaser for value within the meaning of this rule. If the jury should believe from the evidence, including all the facts and circumstances, that what appeared in form to be a sale and conveyance to the defendant was in secret trust for the original purchaser, then the same principles, and those only, would apply that arise in this class of cases against such original purchaser, since one holding goods under a pretended sale in secret trust for the original purchaser must stand in the shoes of such purchaser. If the defendant successfully carries the burden as above indicated, then the onus shifts to the plaintiff to prove to the reasonable satisfaction of the jury, that the defendant, a subpurchaser, had notice of the fraud

when he purchased, or before he paid the purchase money or parted with the consideration, or had knowledge of facts putting him on inquiry which, if diligently prosecuted, would have brought him to a knowledge of the plaintiff's claim.

The principles of law which obtain in a contest between a creditor, on the one hand, and a purchaser from his failing debtor, on the other, are not applicable in this case and similar cases. The motives of the parties are not material. If the defendant be a purchaser for value without notice or knowledge of facts that would lead to notice, it is not important that the consideration was in part cash, or even that the price paid was greatly less than the value of the property, provided he parted with a consideration of some value as distinguished from a merely good consideration. There might be an absence of good faith, in that the purchase by the defendant was made to defraud the creditors of the original vendee; yet, if the latter committed no fraud in the first purchase, or if the defendant was a purchaser for value without notice, as above defined, the plaintiff could not recover. These rules are the result of all of our previous decisions, although they will not be found stated exactly in the foregoing form; and it may be these principles will not all be found to have been announced in any one case. ²²² We collect these cases from which the principles applicable have been derived: *Loeb v. Fash*, 65 Ala. 526; *Spira v. Hornthall*, 77 Ala. 137; *Hornthall v. Schonfeld*, 79 Ala. 107; *Kyle v. Ward*, 81 Ala. 120, 1 South. 468; *LeGrand v. Eufaula Nat. Bank*, 81 Ala. 123, 60 Am. Rep. 140, 1 South. 460; *Robinson v. Levi*, 81 Ala. 134, 1 South. 554; *Darby v. Kroell*, 92 Ala. 607, 8 South. 384; *Johnston v. Bent*, 93 Ala. 160, 9 South. 581; *Traywick v. Keeble*, 93 Ala. 498, 8 South. 573; *Wilk v. Key*, 117 Ala. 285, 23 South. 6.

The earlier cases do not in terms require that the sale must have been induced by the fraudulent representation, or must have resulted from a want of knowledge on the part of the vendor of some material fact which the purchaser fraudulently concealed; but this omission is explained in *Darby v. Kroell*, 92 Ala. 607, 8 South. 384, where it was said: "This absence of reference to the familiar doctrine that fraud for which a contract may be rescinded must have conduced to its execution is due to the fact that the exigencies of those cases did not require a consideration of that question; there being no evidence in any of them which tended to show that the

seller did not rely on the statements of the purchaser, and not to the idea that the general rule was not applicable to this class of cases. There is, and can be, indeed, no reason why it should not fully obtain in a case like this and defeat rescission and recovery, when the jury find that, though false representations have been made and fraudulent concealments have been resorted to, the seller did not rely or act on such representation, and was not influenced by a state of facts which the purchaser's concealment induced him to believe existed."

Before treating of such of the instructions to the jury as we propose to specially consider, it may be well to direct attention to the tendencies of the evidence. The goods sued for and recovered were not all sold at the same time. The plaintiff began to extend credit to Reeves, the original purchaser, about August 1, 1902, and the goods were sold to him from time to time during the period intervening between that date and April, 1903, when the last purchase was made. The course of dealing ²²³ was that plaintiff's representative would visit Reeves about every two weeks, collect money on account, and sell him other goods, if he desired to buy. For some months before his failure Reeves had owed the plaintiff as a result of their method of dealing, and at one time owed more than the amount of the indebtedness which existed when he failed. At no time prior to the date of the last purchase, about April 1, 1903, did Reeves make, or was he asked to make, any statement as to his financial condition to the plaintiff. On several occasions plaintiff's salesman tried to sell Reeves more goods than the latter wanted, and this was true on the occasion of the last purchase, at which time Reeves paid him more money on account than the amount of the then purchase. Reeves denied having made any statement as to his condition at any time; but plaintiff's representative testified that about April 1, 1903, and prior to that sale, "Reeves stated to him that April 18th would be pay day with some mill hands near there, and that he could pay him some considerable sum on his account, that he was getting along well, that his home was paid for, that he owned two houses and was making money, and that the mill hands owed him." There seems to have been no effort by testimony to identify any of the goods sued for as having been a part of the last purchase, or to show when and in how many separate transactions the particular goods were bought, except by the general state-

ment that Reeves purchased the goods from August 1, 1902, to April 1, 1903. The failure of Reeves occurred about two or three weeks after his last purchase of goods, he being insolvent, and took the form, according to the defendant's evidence, of a sale by Reeves to him of his stock of goods, exclusive of book accounts, at the sum of five hundred dollars, of which the sum of one hundred and fifty dollars was claimed to have been paid in currency, and for the balance of the purchase price a past due note of Reeves for three hundred and fifty dollars was testified to have been surrendered. The evidence conflicted as to the value of the stock, and the plaintiff introduced evidence of a statement of defendant that his purchase included the book accounts also. There was evidence that after the failure Reeves was collecting the accounts, and ²²⁴ that, after being absent a few days, he returned to the store and was engaged there; the defendant claiming that he was employed as a clerk merely. The plaintiff's evidence showed that Reeves started in business with a small stock, which gradually increased; that the stock was open to plaintiff's salesman, and that he could plainly see what Reeves had, although he knew nothing about the book account; and Reeves testified that he did not conceal or make any effort to conceal his condition from Mays, the plaintiff's agent, who dealt with him; that Mays visited his store every two weeks before the failure for two and one-half years, and knew what he had; that his property consisted of a small homestead worth three hundred dollars, his stock of goods and book accounts, and that Mays often desired to sell him more goods than he would buy.

We have already stated the rules of law applicable to a controversy of this character. Situated as this case is, it is obvious that account should be taken of the circumstance that the court is not dealing with a single purchase, but with numerous separate purchases covering a period of nine months, and that to obtain a proper result application of the true principles must be made to each transaction. There might be fraud justifying rescission in one and not in another, and if there were fraud in one purchase at the time it was made, and yet the purchase price was thereafter paid, most clearly there could be no rescission of that particular sale. Moreover, if there was fraudulent concealment or misrepresentation, and this was not relied on and did not induce the sale, there could be no recovery; and this principle might

operate in one instance to defeat recovery of goods then sold, and not do so in another.

The charges asked on both sides were framed without reference to the separateness of the several purchases, and were formulated as if the jury were dealing with the last purchase alone, at the time of which there was proof of representations as to the financial condition of Reeves. We will not undertake to criticise each charge given and refused, as what we have said will constitute a sufficient guide for another trial. We are not prepared to say the general charge should have been given for the defendant ²²⁵ on the whole case, and it was upon the whole case that it was asked. Whether, under the evidence, there was in reality a sale to Pelham, or whether the sale was in secret trust for Reeves, was a question of fact for the jury, and will be an inquiry of importance if a case justifying a rescission as to any of the goods be made out in accordance with the principles of law herein announced. It was likewise a question for the jury whether Pelham was a purchaser for value and without notice.

That portion of the court's general charge to which an exception was reserved was erroneous in declaring that upon the hypothesis stated a right of rescission existed, without reference to the solvency or insolvency of Reeves. One of the essentials of a right to rescind is that the purchaser must have been insolvent or in failing circumstances.

Charges 1, 3 and 4, given for the plaintiff, pretermitted inquiry whether the alleged fraud of the vendee induced the vendor to sell him, and were improperly given.

Charge 10, and others like it, postulating a finding by the jury that the purchase was fraudulent, might well have been refused, because not defining to the jury the elements constituting a fraudulent sale, but were not for that reason positively erroneous, since their misleading tendency might have been obviated by an explanatory charge.

It was not an error to disallow defendant to prove that plaintiff had sought to collect the debt from Reeves, or to compromise with him, before bringing this suit. A creditor may well request his debtor to pay for goods purchased, and, if payment be refused, may seek rescission, if the conditions justify it. A creditor does not waive his right of rescission by requesting payment from his debtor. The creditor took no legal action against Reeves, and did nothing inconsistent

with the exercise of his right of rescission, if such right existed.

Reversed and remanded.

Tyson, Simpson and Anderson, JJ., concur.

A Fraudulent Purchase of Goods entitles the vendor to rescind and to recover the goods as his own by an action of replevin, or to recover their value in an action of trover: *Sleeper v. Davis*, 64 N. H. 59, 10 Am. St. Rep. 377; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 75 Am. St. Rep. 413. But the return or tender of the amount received on account of the sale is usually a condition precedent to maintaining replevin: *Adam Meldrum etc. Co. v. Stewart*, 157 Ind. 678, 87 Am. St. Rep. 240. If the vendor acts promptly, he may recover the goods or their proceeds in the hands of a receiver of the vendee (*Seeley v. Seeley-Howe-Le Van Co.*, 130 Iowa, 626, 114 Am. St. Rep. 452), or follow the money derived from their sale into the hands of the sheriff or an assignee for the benefit of creditors: *Converse v. Sickles*, 146 N. Y. 200, 48 Am. St. Rep. 790. However, a failure of the vendor to pursue his right, while others buy the goods of the vendee when clothed with apparent title, may operate as a waiver of his rights: *Leatherbury v. Connor*, 54 N. J. L. 172, 33 Am. St. Rep. 672.

BIRMINGHAM RY. L. & P. CO. v. ADAMS.

[146 Ala. 267, 40 South. 385.]

CARRIERS OF PASSENGERS, Negligence of, When Sufficiently Averred.—A count averring that the plaintiff was injured while a passenger upon defendant's railway, in a mode specified, and that these injuries were proximately caused by the negligence of defendant's servants in and about the carriage of the plaintiff as a passenger upon the railway of the defendant, is not open to objection because of the generality of the averment of negligence. (p. 29.)

PLEADING—Negligence, Averment of Duty of the Plaintiff, When Unnecessary.—It is not necessary, in an action against a carrier of passengers, to specifically aver that the defendant owed a duty to the plaintiff not to injure him. When the gravamen of the action is the alleged negligence or misfeasance of another, it is sufficient, as a general rule, that the complaint allege the facts out of which the duty springs, and that the defendant negligently failed to do and perform them. (pp. 29, 30.)

PLEADING—The Duties Incident to Carriers of Passengers.—When the relation of carrier and passenger is shown, the duties of the former will be inferred without being specifically pleaded. (p. 30.)

PLEADING.—Certainty to a Common Intent is all that is necessary in construing a pleading. (p. 30.)

PLEADING that Defendant was a Common Carrier, When Need not be Specifically Averred.—A pleading averring that the plaintiff was a passenger on the defendant's railway, and that the injuries of which he complains were proximately caused by the

negligence of the defendant's servants in and about the carriage of the plaintiff as a passenger of the defendant, sufficiently avers that the plaintiff was accepted as a passenger of defendant, and that it undertook the service of carrying him as such passenger. (pp. 30, 31.)

CONSTRUCTION OF WORDS.—The Word "Passenger" means one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier on the payment of fare, or what is accepted as an equivalent therefor. (p. 31.)

Action to recover damages resulting to plaintiff from the collision of defendant's car with a train of cars on the Louisville and Nashville railroad through the negligence of defendant's servants and agents. The first and second count alleged the relation of carrier and passenger, the payment of fare by the latter, the collision, the negligence of the servants of the defendant, and that in consequence the plaintiff was injured. Count A was as follows: "Plaintiff claims of the defendant, a body corporate doing business in Jefferson county, state of Alabama, twenty-five thousand dollars damages, for that on, to wit, February 3, 1904, plaintiff, while a passenger upon defendant's railway, at or near a station known as the 'L. & N. Crossing,' between Birmingham and Gate City, in the county and state aforesaid, was injured as follows: Plaintiff was bruised and mashed, shocked, and otherwise injured about his face, back, legs, head, stomach, eyes, and other parts of his person. His back was wrenched and sprained. He was scarred, crippled and disfigured. His right eyesight was permanently impaired. His nervous system was wrecked, thereby causing plaintiff to endure very great mental and physical pain and suffering, and permanently rendering plaintiff less able to earn a livelihood. Plaintiff avers said injuries to have been proximately caused by the negligence of the defendant's servants in and about the carriage of the plaintiff as a passenger of the defendant." Count B differed from count A only in the allegation that the negligence of the defendant's servants was willful, wanton and intentional.

Tillman, Grubb, Bradley & Morrow, for the appellant.

Denson & Denson and W. E. Fort, for the appellee.

²⁷⁰ **WEAKLEY, C. J.** There is no bill of exceptions in the record, and the appeal is prosecuted to review rulings on demurrer to the four counts of the complaint. No argument or citation of authority is necessary to demonstrate that

the demurrers to counts 1 and 2 were properly overruled. The important and controlling question arises upon count A, added by amendment. Count B is identical with the former in its essential averments, except that, instead of simple negligence, it charges willful, wanton, or intentional misconduct, and the principles to be announced with reference to count A will also apply to count B.

Many grounds of demurrer were assigned, but the only ones we deem it necessary to discuss, although all have been considered, are the following: 1. It does not appear what duty defendant owed the plaintiff; 2. It does not appear with sufficient certainty wherein or how defendant violated any duty it owed the plaintiff; and 3. For that the relation existing between plaintiff and defendant is not averred with sufficient certainty, in that the count fails to allege defendant was a common carrier.

Count A avers that the plaintiff "while a passenger upon defendant's railway," was injured in a way specified, and that his injuries were proximately caused by the negligence of the defendant's servants "in and about the carriage of the plaintiff as a passenger of the defendant." Upon the authority of *Armstrong v. Montgomery Street Ry. Co.*, 123 Ala. 233, 26 South. 349, and cases therein cited, it must be held that the count was not open to the objection because of the generality of its averment of negligence. Nor was it necessary to ²⁷¹ specially aver that defendant owed a duty to the plaintiff not to injure him. It has long been settled in this state that "when the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule, it is sufficient, if the complaint aver the facts out of which the duty springs and that the defendant negligently failed to do and perform," etc.: *Leach v. Bush*, 57 Ala. 145; *Mobile etc. Ry. Co. v. Crenshaw*, 65 Ala. 566. And when the facts out of which the duty is supposed to spring are averred, and these facts show a duty to the plaintiff not negligently to injure him, the pleading is sufficient (under our liberal rules, which authorizes averments in their nature little more, if anything, than legal conclusions) as against a demurrer complaining that no duty is shown. The duties incident to a carriage of passengers, when the relation is shown, will be inferred without being specially pleaded: *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322.

The inquiry then arises whether the facts averred in count A show the relation of carrier and passengers between the plaintiff and defendant. In construing the count, it must be remembered that certainty to a common intent is all that is necessary: *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863, 8 South. 371. All pleadings should be as brief as is consistent with perspicuity and the presentation of the facts in an intelligible form, and "no objection can be allowed for defect of form, if acts are so presented that a material issue of law or fact can be taken by the adverse party thereon": Code 1896, sec. 3285. Although the count does not aver that the defendant was a common carrier, yet it does show in brief and intelligible form that the plaintiff was "a passenger upon defendant's railway," and that the injuries of which he complains were "proximately caused by the negligence of the defendant's servants in and about the carriage of the plaintiff as a passenger of the defendant." A common carrier of passengers is one who is engaged in a public calling, which imposes upon ²⁷² him the duty to serve all without discrimination: 6 Cyc. 533. But he need not be a common carrier in order to make him liable for negligent injury to his passenger whom he actually accepts and undertakes to carry. For instance, if a railroad company permits a passenger to ride upon a freight train, it is liable to him for negligently injuring him, although not required to transport the passenger on such train, and not a common carrier of passengers as to that means of transportation: *International & G. N. Ry. Co. v. Irvine*, 64 Tex. 529, and authorities there cited; *Whitehead v. St. Louis I. M. & S. Ry. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

Giving count A a reasonable construction, free from narrowness or mere verbal criticism, we hold that it at least showed plaintiff was accepted as a passenger of the defendant, and that defendant undertook the service of carrying him as such passenger. Upon these facts, the duty not negligently to injure him arises; and, the complaint averring that defendant's servants in and about the service of carrying him, by their negligence injured him, the count states a cause of action, and was not open to any of the grounds of demurrer assigned to it. It was not necessary to aver that defendant was a common carrier; that is, was required to carry all who applied for transportation. It was sufficient to make it appear that at the time of the injury plaintiff was actually

a passenger and was being transported as such, and that his injuries were due to the negligence of defendant's servants as averred in count A. Pro hac vice, defendant was a carrier, owing to plaintiff the duty of that relation: *Atlantic & Pac. R. R. Co. v. Laird*, '58 Fed. 760, 7 C. C. A. 489. The word "passenger," ex vi termini, means "one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, on the payment of fare or that which is accepted as an equivalent therefor": *Pennsylvania R. R. Co. v. Price*, 96 Pa. 256; *Norfolk & W. R. R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721; 6 Words and Phrases Judicially Defined, 5218, 5219. Some of the ²⁷³ authorities assert that the word, when used in reference to carriage by a railroad, imports a person whom said transportation agency in the performance of its duty as a common carrier has contracted to carry: *Patterson's Railway Accident Law*, 204; *Schepers v. Union D. R. R. Co.*, 126 Mo. 665, 29 S. W. 712. The exigencies of this case do not require us to go that far, and we reserve our opinion upon that proposition until it becomes necessary to decide it.

Upon the foregoing considerations, count A must be held to have been good; and count B falls within the influence of the same principles. No error appearing, let the judgment be affirmed.

All the justices concur.

A Complaint Which Alleges, in substance, that the railway car in which the plaintiff was traveling was derailed through the negligence of the railway company and its servants, is sufficient without stating the particular acts of negligence which caused the derailment and the injury: *Gulf etc. Ry. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. Rep. 345.

BALL v. MOBILE LIGHT AND POWER COMPANY.

[146 Ala. 309, 39 South. 584.]

STREET RAILWAYS, Custom of to Carry Children Without Compensation.—In an action against a street railway company to recover for injuries to a child, it is competent for the plaintiff to show the general custom of the defendant not to charge fare for children of the plaintiff's age. (p. 32.)

STREET RAILWAYS, Liability of for Injuries to Children for Whose Carriage No Fare is Paid.—Where it is the custom of a street railway to carry children without the payment of fare when riding with older persons, there is no doubt that the relation of carrier and passenger exists between the railway and the children, making the railway companies answerable for injuries to children due to the negligence of the former's servants. (p. 33.)

STREET RAILWAYS—Negligence, When a Question for the Jury.—If in an action against a street railway company for injuries to a child, the evidence tends to show that the car was stopped with unusual suddenness and a jerk, and by such sudden stopping the child was thrown from the seat and injured, the court cannot say, as a matter of law, that the defendant's servants were not guilty of negligence. (p. 33.)

Action by a child by its next friend to recover for injuries alleged to be due to the negligence of the defendant while the plaintiff was being carried as a passenger. The trial court told the jury to return a verdict for the defendant; the plaintiff appealed.

McAlpine & Robinson, for the appellant.

Gregory L. and H. T. Smith, for the appellee.

311 DOWDELL, J. No questions on the pleadings are presented by the record for our consideration. The plea of not guilty was filed to the complaint, and on this issue alone the case was tried. Upon the conclusion of the plaintiff's evidence, the defendant offering no testimony, the trial court, at the request of the defendant, gave the general affirmative charge in its favor.

The plaintiff's evidence showed that the plaintiff was a child under four years of age, and at the time of the alleged accident was riding on the defendant's street railway car, accompanied by his mother, who had paid her fare as a passenger on said car. No fare had been paid for the child, and in this connection it was competent for the plaintiff to show a general custom on the part of the defendant not to charge fare for the carriage of children of plaintiff's age. And, un-

der such circumstances, we think there can be no doubt of the existence of the relationship of passenger and carrier between the child and the defendant. In the present case there was evidence, however, tending to show that the plaintiff was a passenger, irrespective of proof of a custom above adverted to. Rufus Williamson testified that "there were about seven or eight passengers on the car, and this little boy, Freddie Ball, was one of the passengers." With this testimony in, the question of passenger vel non was a question for the jury.

There was evidence tending to show that the car was stopped with unusual suddenness and a jerk, and by the sudden stopping of the car the child was thrown from the seat and injured. On this evidence the question of negligence in the manner of stopping the car by the defendant's servant was one for the determination of the ³¹² jury, and the court could not say as a matter of law that the defendant's servant was not guilty of negligence. It follows, therefore, that the court erred in giving the general affirmative charge for the defendant.

Reversed and remanded.

Haralson, Anderson and Denson, JJ., concur.

A Railroad Company is liable to persons whom it accepts for transportation and from whom it demands no fare to the same extent that it is liable to passengers who pay fare: *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346, 36 Am. St. Rep. 550; *Russell v. Pittsburgh etc. Ry. Co.*, 157 Ind. 305, 87 Am. St. Rep. 214. As to the application of this rule to children, see the note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 100.

The Presumption of Negligence arising from a sudden starting or stopping of a railway car to the injury of passengers therein is discussed in the note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 1023.

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TUTWILER COAL, COKE AND IRON COMPANY v. NICHOLS.

[146 Ala. 364, 39 South. 762.]

LIMITATION OF ACTIONS to Recover Damages for the Pollution of Watercourses.—Under subdivision 6 of section 2806 of the Code of Alabama of 1896, a riparian proprietor is not entitled, in an action to recover damages for the pollution of a stream, to recover for any damages accruing more than one year prior to the commencement of the action, but large latitude and discretion are allowed to the jurors in the separation of damages accruing within twelve months from those suffered before that time. (p. 38.)

EVIDENCE in an Action to Recover Damages for the Pollution of a Watercourse—Limitations of Actions.—Though a riparian proprietor is not entitled to recover damages for the pollution of a watercourse except for one year next before the commencement of the action, yet evidence of the condition of the stream both prior to that year and subsequently to the commencement of the suit is relevant and competent for the purpose of showing the effect of the deposits on the land and in the river. (p. 38.)

EVIDENCE of Crops Raised on Land and Their Value is admissible in an action to recover damages for the pollution of a watercourse by casting debris therein, as tending to show the nature and character of the land and what it is adapted to, and thereby shedding light on its value. (p. 39.)

EVIDENCE of the Odor Given to a Watercourse by deposits made therein is admissible in an action to recover damages for its pollution. (p. 39.)

DAMAGES, Fish in Stream as Adding to.—In an action by a riparian proprietor to recover for the pollution of a watercourse, it is admissible for him to show that the fish in the stream had decreased and his catch thereof had become less, though he has no title in the fish until caught. (p. 39.)

EVIDENCE, Excluding on Motion.—Where objection is not made to evidence or on the question calling for it, it is not a matter of right in a party against whom it is given to have it excluded on motion. (p. 39.)

DAMAGES—Evidence Respecting Lands not Injured.—In an action to recover damages for the pollution of a watercourse, a deed conveying land to the plaintiff is admissible, though such land is not touched by the river, if it adjoins other lands of the plaintiff and the whole forms one farm and the river flows through each of the other tracts. (p. 39.)

JURY TRIAL—Abstract Instructions.—A charge which is abstract may, for that reason, be properly refused. Hence it is not error to refuse to charge a jury that if the plaintiff's fish-traps were so constructed as to prevent the passage of fish up the stream, he cannot recover, there being no evidence offered by either party respecting the manner of the construction of such traps. (p. 40.)

JURY TRIAL—Error in Refusing Charge Respecting the Limitation of Actions.—It is reversible error to refuse to instruct a jury that the plaintiff cannot recover damages accruing more than one year prior to the commencement of the action when the statute of limitations restricts the recovery to such year. (p. 40.)

JURY TRIAL—Instruction as to Damages, When Properly Refused.—In an action by a riparian proprietor to recover damages for the pollution of a watercourse, it is not error to refuse to charge the jury that if they believe from the evidence that prior to August, 1901, the plaintiff's land had been injured by deposits and the waters of the river had been rendered as impure as they were when the suit was brought, the plaintiff cannot recover. (p. 40.)

DAMAGES—Jury Trial—Instructions as to Excluding Evidence of Crops, When Should be Given.—An instruction that if the jury believe from the evidence that the injury to plaintiff's land was permanent, there can be no recovery by him, so far as his lands are concerned, for the loss of his crops, but only for the permanent injury to his lands, should not be refused, where there was no evidence that the plaintiff lost the crop by deposits or overflow, but the tendency of the evidence was to show that by deposits and overflow the land was rendered less fertile and productive and its yields diminished, the action being one to recover damages for the pollution of a watercourse by the depositing of debris therein. (p. 40.)

Action by the plaintiff corporation to recover damages for polluting a watercourse and depositing debris therein. The complaint alleged the plaintiff to be the owner of the land described therein, through and along the side of which flowed the channel of Little Warrior, a river having a well-defined channel; that the river furnished a large supply of constantly flowing pure and wholesome water; that the lands of the plaintiff were naturally fertile and could be profitably devoted to agriculture and horticulture, but were overflowed by the waters of the river; that the defendant had caused to be placed in the channel of the river or its tributaries large quantities of refuse, waste, and poisonous matter from its mines and other industries, which matter has been carried down by the waters of said river and its tributaries and deposited upon plaintiff's land, which were overflowed by said stream and greatly damaged; that said water was suitable to be used for domestic purposes, but by its pollution by the acts of the defendant had become useless to plaintiff for domestic purposes and rendered impure and unwholesome, and so poisoned and polluted that it gave off foul and unpleasant odors when passing by or through such land, and rendered plaintiff's premises unhealthful; that such waters had become poisonous and destructive to its domestic animals. Count 3 of the complaint alleged that a large part of plaintiff's land had been and was arable and under cultivation, and before the grievance complained of was productive, and there grew thereon large and valuable agricultural and horticultural crops; that he had thereon a comfortable home and outhouses and other farm buildings; that he had in the stream a large and valu-

able fishery or fish-trap from which he caught large quantities of valuable fish, and that there were on the lands many varieties of fish which afforded pleasure and profit to catch, but that barriers which the defendant caused to be placed in the channel of the river consisting of large quantities of waste, refuse, and poisonous matters from its mines and industries, which matter was carried down by the waters of the river and deposited on the land of the plaintiff, rendering it less productive and profitable and more difficult to cultivate, and injuriously affecting the health of plaintiff's family and tenants, and causing fish to become less numerous and to leave the stream, thereby destroying the value of plaintiff's fishery; that by the filling up of the bed of the stream by such deposits his fish-trap had been greatly injured and rendered less valuable; that there was valuable water-power in the stream which had also been rendered less valuable by such acts of the defendant and the filling up of the channel of the stream therefrom.

Demurrers were filed to the complaint on various grounds, the seventh of which was that it did not appear that the filling of the channel of the stream was caused by defendant's act. The pleas were the general issue and the statute of limitations. The evidence tended to support the plaintiff's complaint.

Defendant requested charges which were refused by the court, and which are as follows:

“(1) I charge you, gentlemen of the jury, that if you believe, from the evidence, that the plaintiff's fish-trap is not so constructed as to permit fish to pass through or around same, you can find no damages to plaintiff on account of injury to his fishery; (2) I charge you, gentlemen of the jury, that in this case there can be no recovery by the plaintiff in this case for any damages done to him or his lands by defendant for more than one year prior to the bringing of this suit; (3) I charge you, gentlemen of the jury, that if you believe, from the evidence, that prior to August, 1901, the plaintiff's lands had been as greatly injured by deposits of refuse and deleterious matter, and the waters of the river had been rendered as impure as they were at the time this suit was brought, plaintiff cannot recover; (4) I charge you, gentlemen of the jury, that if you believe, from the evidence, that the injury to plaintiff's land is permanent, there can be no recovery by plain-

tiff, so far as his lands are concerned, for the loss of his crops, but only for the permanent injury to his lands."

Verdict and judgment for the plaintiff; defendant appealed.

Benners & Benners, for the appellant.

Frank S. White & Sons, for the appellee.

³⁷⁰ DENSON, J. Action on the case by R. B. Nichols, plaintiff, against the Tutwiler Coal, Coke and Iron Company, defendant, to recover damages for the pollution of a stream of water and alleged injuries to realty. Plaintiff owned a tract of land in Jefferson county through which, or by the side of which, flowed the Little Warrior river. Five Mile creek and Village creek are tributaries of Little Warrior river. Plaintiff's land was located down the river, between five and seven miles distant from the mouth of Five Mile creek, and two miles distant from the mouth of Village creek. Plaintiff owned the surface of the lands alleged in the complaint as belonging to him. The minerals underneath belonged to another party. On Prude Branch, which flowed into Five Mile creek, the defendant operated a coal-washer of four hundred tons capacity per day. The washer was near the defendant's coal mine. The coal was carried from defendant's mine and put into the washer after being ground up, and was subjected to the action of water, which separated the coal from the impurities in it, and the water and impurities flowed from the washer back into Prude Branch. The washer was constructed on the branch in 1897. There are ten other coal-washers belonging to other companies, located on Five Mile creek and its tributaries, and five on Village creek. All of them were constructed in a period ranging from 1893 to 1900. The capacity of all the washers on Five Mile creek and its tributaries, including defendant's washer, was seven thousand five hundred tons daily. The complaint does not refer to any washer except the defendant's. It is averred in the complaint that Little Warrior river naturally furnished a large supply of constantly flowing, pure and wholesome water; that much of plaintiff's land is overflowed by the river. It further shows that defendant ³⁷¹ placed, or caused to be placed, in the channel of the river, or the tributaries thereof, above plaintiff's land, large quantities of waste, refuse, and poisonous matter from its mines or other industries, and that said waste, refuse and poisonous matter was carried by the wa-

ter of the river down to and deposited on plaintiff's land, rendering the land less productive, more difficult to cultivate, polluting the stream, etc.

The demurrer filed to the amended complaint was overruled. The overruling of the demurrer is assigned as error, but the appellant in its brief only insists on the seventh ground of the demurrer to the third count. Construing the count as a whole, it is obvious that the demurrer was not well made. The principles of law which underlie and control the case in its main features have been so explicitly stated and elaborately discussed in the cases of *Tennessee Coal etc. Ry. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167, *Drake v. Lady Ensley Coal etc. Ry. Co.*, 102 Ala. 501, 48 Am. St. Rep. 77, 14 South. 749, 24 L. R. A. 64, and in the cases referred to in those cases, that we deem it unnecessary to enter again upon a discussion of them.

The case was tried on the general issue and a plea of the statute of limitations of one year filed by the defendant. The evidence was in conflict upon the question as to whether the washer of the defendant caused any damage to the plaintiff and also upon the extent of the damage. The action is case, and with respect to the statute of limitations it falls under subdivision 6 of section 2801 of the Code of 1896. Damages which accrued more than a year prior to the commencement of the suit are not recoverable. "But much latitude and discretion are allowed to juries in the separation of damages accruing within the twelve months from those suffered before that time": *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Drake v. Lady Ensley Coal etc. Ry. Co.*, 102 Ala. 501, 48 Am. St. Rep. 77, 14 South. 749, 24 L. R. A. 64; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Polly v. McCall*, 37 Ala. 20; *Central of Georgia Ry. v. Windham*, 126 Ala. 552, 28 South. 392.

³⁷² The action was commenced August 7, 1902, and the plaintiff could recover for only such damages as he suffered within the twelve months prior to that date; but evidence of the condition of the streams prior to the twelve month period and subsequent to the commencement of the suit was relevant and competent, for the purpose of showing the effect of the deposits, if any, on the land and in the river: *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Polly v. McCall*, 37 Ala. 20;

Central of Georgia Ry. v. Windham, 126 Ala. 552, 28 South. 392.

The evidence of the plaintiff with reference to the kind of crops that he raised on the lands and their value was competent, as tending to show the nature and character of the land and what it was adapted to, as shedding light on the question of its value.

In estimating plaintiff's damages, comfort of occupation of the lands was proper to be considered by the jury; hence, if the stream was polluted by the defendant's act, it was competent to show whether the health of plaintiff's family had been affected. This was within the allegations of the complaint: *Tennessee Coal etc. Ry. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167. It was also competent in this respect to show the odor of the river, if any.

Notwithstanding the fact that the plaintiff had no title in fish in the stream until they were caught, it was competent and relevant evidence that the fish had decreased in the stream, and that plaintiff's catch had not been as great since the operation of the washer; also that dead fish were discovered in the stream. This result, of course, must have been traced to the pollution of the stream, or it would not benefit plaintiff's case; but this was not within the objection made by the defendant.

If the brief of counsel makes it sufficiently clear that the eleventh assignment of error is insisted upon, it is sufficient answer to it that the motion to exclude the evidence rested in the discretion of the court. Where objection is not made to the evidence or to the question calling for it, it is not a matter of right in the party against whom it is given to have the evidence excluded on motion: *Payne v. Long*, 121 Ala. 385, 25 South. 780; *Billingsley v. State*, 96 Ala. 126, 11 South. 409; *McCalman v. State*, ³⁷³ 96 Ala. 98, 11 South. 408. Moreover, the evidence of the plaintiff showed that, while the river did not touch the twenty acres purchased of Elizabeth Nichols, yet this twenty acres adjoined the other lands, and the whole formed one farm, and the river did run through a part of each of the other tracts. This, we think, rendered the deed from Elizabeth Nichols conveying twenty acres of land to plaintiff competent.

This brings us to the consideration of the charges refused to the defendant. It cannot be affirmed as a matter of law

that the defendant did not place, or cause to be placed, in the river or the tributaries thereof debris and refuse matter thrown off from washing the coal by the washer, and on all other questions the evidence was in conflict; hence the affirmative charge was properly refused.

Charge 1, refused to the defendant, was formulated with respect to section 5587 of the Code of 1896, which makes it a misdemeanor for any person by means of dams, traps, or other obstruction to prevent the passage of fish up the waters of any river or creek in this state. The statute provides that it shall not be so construed as to prevent the introduction of traps, or other means of catching fish in such rivers or creeks. There is no evidence in the case tending to show that the plaintiff's trap was constructed in violation of the law. The charge was abstract, and for this reason, if for no other, was properly refused.

Charge 2, refused to the defendant, invoked the statute of limitations of one year. We see no objection to the verbal construction of the charge, nor was it abstract. One year is the limitation to recoverable damages in the action. The court erred in refusing the charge: *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Polly v. McCall*, 37 Ala. 20; *Central of Georgia Ry. Co. v. Windham*, 126 Ala. 552, 28 South. 392.

Charge 3 of the defendant's series was obviously bad and there was no error in the refusal of it. The evidence did not tend to show that plaintiff lost a crop or crops by the deposits or overflow; but its tendency was to show that by the deposits and overflow the land was rendered less fertile and productive, so that the yield was diminished. ³⁷⁴ This tended to show permanent injury to the land, and if the land was permanently injured in that way, plaintiff's damages should have been based on such permanent injury. In this view of the case charge 4, refused to defendant, should have been given.

We have considered all the errors assigned that have been insisted upon in the brief of counsel for appellant except the overruling of the motion for a new trial. As the judgment must be reversed for the error in refusing charges 2 and 4, we deem it unnecessary to consider that assignment of error.

Reversed and remanded.

Tyson, Simpson and Anderson, JJ., concur.

The Pollution of the Waters of a Stream by one riparian proprietor to an unreasonable extent gives a cause of action to lower proprietors injured thereby: Trevett v. Prison Assn., 98 Va. 332, 81 Am. St. Rep. 727; Strobel v. Kerr Salt, 164 N. Y. 303, 79 Am. St. Rep. 643; Watson v. New Milford, 72 Conn. 561, 77 Am. St. Rep. 345. As to the elements and measure of damages recoverable therefor, see Stevenson v. Everdale Coal Co., 201 Pa. 112, 88 Am. St. Rep. 805; Drake v. Lady Ensley Coal etc. Ry. Co., 102 Ala. 501, 48 Am. St. Rep. 77; Tennessee Coal etc. Co. v. Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48; Lentz v. Carnegie, 145 Pa. 612, 27 Am. St. Rep. 717; Kinnaird v. Standard Oil Co., 89 Ky. 468, 25 Am. St. Rep. 545; Ferguson v. Firmench Mfg. Co., 77 Iowa, 576, 14 Am. St. Rep. 319. To place substances in the water poisonous to fish is to create a public nuisance: People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183.

SOUTHERN EXPRESS COMPANY v. OWENS.

[146 Ala. 412, 41 South. 752.]

PLEADING.—The Rule that the Place of the Contract Governs can be Invoked Only by Appropriate Pleadings, followed by proof of the law of the foreign jurisdiction. (p. 43.)

EVIDENCE—Judicial Notice of the Decisions of the Courts of Another State cannot be Taken.—Where the decision of the lower court of another state is relied upon, it must be offered in evidence. Otherwise, though it can be consulted as the court would consult the opinion of any reputable supreme court of a sister state, it does not bind as an adjudication. (p. 43.)

A CONTRACT, Though Made and to be Performed in Another State, must be Construed by the Principles of the Common Law, and in the absence of pleading and proof to the contrary, the court will presume that the common law of the state of the contract is the same as that of the state where the question is presented for decision. (p. 43.)

THE LIMITATIONS of the Liability of a Carrier may Extend not only to risks of accident for which the carrier would be answerable, but to the amount of the damages for which it will be answerable in case of loss or injury, when the purpose appears to be to secure a just and reasonable proportion between the amount for which it is liable and the freight which it is to receive. (p. 44.)

CARRIERS—Damages—Stipulations Purporting to Fix the Value of Property, When not Binding.—A common carrier may not limit its liability for negligence by an agreed valuation upon the consideration of reduced charges for carrying a package, when such valuation is greatly less than the real value of the package, though the contents of the package or its value is not disclosed to the carrier. (p. 47.)

EVIDENCE of the Value of Property.—Where a carrier sued for property lost through its negligence, consisting of manuscript prepared by the plaintiff and having no ascertainable market value, it is proper to permit him to state to the jury the number of pages, the general character of their contents, the time and search consumed in production, and then to ask him to respond to the question, "From

the time and labor devoted by you to the production of this manuscript and the contents of it, the matter contained in it, what would you say was the reasonable value of that manuscript?" (p. 51.)

EVIDENCE OF VALUE.—Where an Article Lost has No Market Value, the rule of damages seems to be its value to the plaintiff, and in ascertaining this value inquiry may be made into the constituent elements of its cost to him in producing it. (p. 51.)

Action to recover for the loss of manuscript delivered by an agent of the plaintiff to the Southern Express Company, in Columbia, South Carolina, to be conveyed by express to Sumter, in the same state. Judgment for the plaintiff for fifteen hundred dollars; defendant appealed.

C. P. McIntyre and Ray Rushton, for the appellant.

W. S. Reese and Phares Coleman, for the appellee.

417 DENSON, J. This litigation arose from the failure of the defendant to deliver to the plaintiff certain goods that were delivered to the defendant as a common carrier at Columbia, South Carolina, to be carried to Sumter, South Carolina, to be there delivered to the plaintiff, the consignee. The complaint is in code form: Code 1896, p. 946, form 15. The description of the goods in the complaint is sufficiently definite to put the defendant on notice as to the particular package on which defendant's alleged dereliction was predicated. Hence the demurrer to the complaint was properly overruled.

It appears from the record that there was no controversy about the facts that the goods were received by the defendant as alleged, and that they were never delivered. In other words, the liability of the defendant was conceded, but it sought to limit its liability to fifty dollars. Pleas 2 and 7 presented this defense. Manifestly the contract sued on is a South Carolina contract. For this reason it is insisted by the appellant that the contract with respect to the liability of the defendant should be construed as such contracts have been construed by the supreme court of that state; in other words, that in declaring the substantive law of the case we should be governed by the adjudications of that court. This insistence invokes the doctrine of *lex loci contractus*, a doctrine which is well established and adhered to in this state. "Parties are presumed to be conversant of the laws of the country in reference to which they contract, and to stipulate with regard to them; and it is a maxim, that '*locus contractus*

regit actum,' unless the parties have manifested a contrary intention": Hanrick v. Andrews, 9 Port. 9; Peake v. Yeldell, 17 Ala. 636; Thomas v. DeGraffenreid, 17 Ala. 602; Camp v. Randle, 81 Ala. 240, 2 South. 287; Southern Ry. Co. v. Harrison, 119 Ala. 539, 72 Am. St. Rep. 936, 24 South. 552, 43 L. R. A. 385.

But the doctrine and maxim can be invoked only by appropriate pleading, followed by proof, of the laws of ⁴¹⁸ the foreign jurisdiction. We cannot take judicial knowledge of the decisions of the courts of other states: Cubbedge v. Napier, 62 Ala. 518; Varner v. Young's Exr., 56 Ala. 260. The South Carolina decision relied on by the appellant was not offered in evidence in the court below, and we cannot regard it as evidence here. "It can be consulted by us, as we could consult the opinion of any other reputable supreme court of a sister state; but it does not bind us as an adjudication": Varner v. Young's Exr., 56 Ala. 260. The contract, then, must be construed by the principles of the common law, and in the absence of pleading and proof to the contrary, we will presume that the common law on the subject in South Carolina is the same that it is in Alabama: 2 Wharton on Conflict of Laws, 3d ed., p. 1534; Crandall v. Great Northern R. R. Co., 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; Forepaugh v. Delaware R. R. Co., 128 Pa. 217, 15 Am. St. Rep. 672, 18 Atl. 503, 5 L. R. A. 508.

The point presented by the pleadings to be determined is whether a carrier may limit the extent of his liability by an agreed valuation upon consideration of reduced charges for carrying a package, when the agreed valuation is greatly less than the real value of the package, and the contents of the package or its value are not disclosed to the carrier. In the case of Alabama etc. R. R. Co. v. Little, 71 Ala. 611, this court said: "The liability of a common carrier is sometimes said to be of a dual nature—the one, a liability for losses by his own negligence or omission of duty, or that of his servants or agents, which is the liability of an ordinary paid agent or his bailee; the other, a liability for the losses by mistake or accident without any fault on his part, for losses accruing by unavoidable accidents, not within the exception of 'the act of God, or of the public enemy, or the fruit of the party complaining,' which is of the nature of the liability of an insurer, having its origin and foundation in the policy of the common law: Davidson v. Graham, 2 Ohio St. 131. What-

ever doubts may at any time have been entertained, it is now well settled that by special contract the carrier may limit or qualify the liability ⁴¹⁹ resting on him as an insurer, or his common-law liability, as it is most often expressed: *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Mobile etc. R. R. Co. v. Jarboe*, 41 Ala. 644; *South etc. R. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578. The limitation of liability may extend, not only to the risks of accidents for which the carrier will be answerable, but to the amount of damages for which he will be answerable in the case of loss or injury, when the purpose appears to secure a just and reasonable proportion between the amount for which he is liable and the freight which he is to receive. In the limitation of liability, the carrier cannot, in any event, stipulate for more than an exemption from the extraordinary liability the common law implies; the liability extending beyond that of ordinary paid agents, servants, or bailees, denominated the 'liability of an insurer.' Public policy and every consideration of right and justice forbid that he should be allowed to stipulate for exemption from liability for losses or injuries occurring through the want of his own skill or diligence, or that of the servants or agents he may employ, or through his own or their willful default or tort."

In the case of *Georgia Pac. Ry. Co. v. Hughart*, 90 Ala. 36, 9 South. 62, goods were received for shipment packed in a box in apparent good order. A portion of the goods in the box were lost—were not delivered by the common carrier. The bill of lading contained a clause limiting the value of the goods to five dollars per one hundred pounds in case of total loss; and it was contended on the trial that, if the plaintiff was entitled to a verdict, his recovery should be limited to five dollars per one hundred pounds of the freight that was lost. The court said: "There is nothing in this contention; for the tendency of the testimony was, and is, that the goods were lost through the negligence or bad faith of the defendant's employés." Then follows the quotation from the *Little* case that we have set out above, and the court said of it: "We fully concur in what was said in *Little's* case (71 Ala. 611), and hold that the city court did not err in the matter of the measure of recovery." The ⁴²⁰ court further said in the *Hughart* case (90 Ala. 36, 9 South. 62): "It is not our intention to overrule or qualify what was said in *South etc.*

R. Co. v. Henlein, 56 Ala. 368, or in the later case of Central Ry. Co. v. Smitha, 85 Ala. 47, 4 South. 708. In consideration of special rates or privileges granted, a shipper may agree on values in case of loss or injury, provided such agreed valuations are not unreasonable or arbitrary, and provided, further, that no agreement exempting the carrier from the consequences of his perfidy or gross negligence is binding on the shipper. The rate expressed in the bill of lading before us—five dollars per one hundred pounds—without any reference to the actual value of the thing shipped, is both unreasonable and arbitrary, and is not binding on the shipper.”

In Louisville etc. R. R. Co. v. Sherrod, 84 Ala. 178, 4 South. 29, the case most strongly relied on by appellant here, the bill of lading contained a stipulation limiting the value of the goods and the extent of the defendant's liability in case of total loss. The agreed statement of facts showed that without such agreement as to the value a much greater rate of freight was charged on such shipments than was charged, which rate was reasonable, and that the limitation as to value was in consideration of a reduced rate of freight and was inserted in the bill of lading as a part of the contract of shipment. In that case this court, speaking through Judge Clopton, said: “Limitations as to the value do not come under the operation of the rule that a carrier cannot, by special contract, exempt himself from liability for the consequences of his own negligence, and ordinarily are not calculated to induce negligence. To the amount of the agreed valuation the carrier is responsible for loss so occasioned by his neglect, or by any of the risks or accidents for which he is answerable. No public good will be subserved by denying to the parties the right to make such contracts. The shipper and the carrier may lawfully contract as to the valuation of the articles to be transported. Such special contract is in the nature of an agreement to liquidate the damages, proportionately to the compensation received for the carriage and the responsibility of ⁴²¹ safely carrying and delivery. When the value has been fairly agreed on, the carrier cannot recover a greater rate, and the shipper should not be allowed to take benefit of the reduced rate, if there is no loss, and to repudiate the contract, if there is a loss.”

It would seem that in Sherrod's case (84 Ala. 178, 4 South. 29), the distinction so clearly made in the Little (71 Ala. 611) and Hughart cases (90 Ala. 36, 9 South. 62), with re-

spect of the dual nature of the liability of the common carrier was lost sight of; for it is clearly held in those cases that, while a common carrier may by contract limit or qualify the liability resting upon him as an insurer, he cannot in any event stipulate for more than exemption from the extraordinary liability the common law imposes. In short, he cannot stipulate for exemption from or limitation upon his liability for losses by his own negligence or omission of duty, or that of his servants or agents, which is the liability of an ordinary paid agent or bailee. The argument urged in the Sherrod case (84 Ala. 178, 4 South. 29), makes the degree of care requisite in the handling of goods depend, not on the nature of the thing to be carried—which ought to be the test of degree of care to be used by all persons or corporations pursuing the business of common carriers, even where a lawful contract limiting liability exists—but on the amount of compensation to be paid. It is said in that case that contracts by common carriers limiting liability are not ordinarily calculated to induce negligence, but exact from the carrier the measure of care due to the value agreed on. But would it not be a very dangerous rule which permits care to be measured by value? It would lead to a holding that the carrier owes but a slight degree of care when the thing to be carried is of small value intrinsically or by an agreed valuation, and the rule would be as fluctuating as is the value of things carried.

We understand the rule to be universal that the carrier must, even when a valid contract limiting liability exists, exercise such care as prudent persons would ordinarily use for the safety of the thing shipped, looking to the nature of that thing. A different rule would make the measure of care to depend on the adequacy of the sum ⁴²² paid for transportation, this to be determined by the value of the thing to be carried, and which cannot be a correct rule, unless it be true that the degree of care to be used by a common carrier is to be measured by the compensation to be paid: We do not understand that such a rule ever has been or ever ought to be established. Followed to its legitimate result, such a rule would require the holding that a carrier by agreeing to gratuitously transport freight might by contract relieve itself from liability entirely and from obligation to exercise even the slightest care. In the case of a gratuitous mandatary, not charged with any public duty, we understand such rule to

have been denied. It seems to us that such contracts do induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. The author of the American and English Encyclopedia of Law says: "By the clear weight of authority in England, Canada, the United States, and almost without exception in the states of the Union, the rule has been adduced that the common carrier can make no contract the effect of which will be to exempt him from liability for negligence": 2 Am. & Eng. Ency. of Law, 822.

Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability. It only provides for partial or limited exemption. Upon that distinction the nice and important question arises: Can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the property lost or destroyed, can the limitation of its liability to fifty dollars be upheld in the court, if it ⁴²³ should appear that its loss resulted from the negligence of the company and that it was in fact worth thirty times that amount, as the court found it to be? We think not. To our mind it is clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground and must be tested by the same principles. If one can be enforced the other can. If either be invalid, it would seem that both must be held to be so; the same consideration of public policy operating in each case. The last utterance by this court on this subject is in line with the foregoing views, and we think is sound: *Southern Ry. Co. v. Jones*, 132 Ala. 437, 31 South. 501. See, also, *Louisville & N. Ry. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Coward v. East Tennessee Ry. Co.*, 16 Lea, 225, 57 Am. Rep. 227; *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. '85, 47 Am. Rep. 781, 16 N. W. 497; *Kansas City etc. Ry. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 104, 2 Pac. 821; *Chicago etc. Ry. Co.*

v. Abels, 60 Miss. 1017; United States Exp. Co. v. Blackmon, 28 Ohio St. 144; Black v. Goodrich T. Co., 55 Wis. 319, 42 Am. Rep. 713, 13 N. W. 244; Rosenfield v. Peoria etc. Ry. Co., 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Missouri Pac. Ry. Co. v. Fagan, 72 Tex. 127, 13 Am. St. Rep. 776, 9 S. W. 749, 2 L. R. A. 75; Boscowitz v. Adams Exp. Co., 93 Ill. 525, 34 Am. Rep. 191.

We have examined the authorities relied upon by the appellant, and some of them undoubtedly support its contention. But we think the true rule is, and should be, that a common carrier has the right to restrict his common-law liability by special contract; and this extends to all losses not arising from his own neglect or omission of duty. "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interest. He is held to that degree of diligence which very careful and prudent men take of their own affairs, and he is responsible for all losses arising from a neglect of that degree of diligence enjoined upon him by his ⁴²⁴ public employment; and public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties. The degree of diligence required by law of a common carrier is a matter over which he has no control and in which the public is interested": Southern Ry. Co. v. Jones, 132 Ala. 437, 31 South. 501; Georgia Pac. Ry. Co. v. Hughart, 90 Ala. 36, 8 South. 62; Alabama etc. R. R. Co. v. Little, 71 Ala. 611; Louisville etc. R. R. Co. v. Oden, 80 Ala. 38; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Davidson v. Graham, 2 Ohio St. 131, and authorities supra; The City of Norwich, 4 Ben. 271, Fed. Cas. No. 2761; Sager v. Portsmouth etc. R. Co., 31 Me. 228, 1 Am. Rep. 659; New York Cent. R. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627. "It must be understood, however, that where the shipper of goods practices a fraud on the carrier, either by his acts or omissions, as to the value of goods, fraudulently concealing their value from the carrier, such fraud operates to discharge the carrier from liability. But a mere failure on the part of the shipper to inform a carrier as to the value of goods shipped would not per se be such fraud as would discharge the carrier. It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to de-

ceive him, whereby his risk is increased or his care and vigilance may be lessened; and if there is such fraud and unfair concealment, it will make the contract a nullity": *Texas Exp. Co. v. Scott*, 2 Wills. Civ. Cas. Ct. App., sec. 72; *Houston etc. R. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

The principle above stated with respect of fraud is not invoked by any of defendant's pleas. The demurrer to plea 5 was properly sustained. And there is no error in the rulings of the court with respect to the demurrers to replications to pleas 2 and 7: *Southern Exp. Co. v. Jones*, 132 Ala. 437, 31 South. 501. The demurrer to plea 6 was properly sustained on the authority of *Southern Exp. Co. v. Tupelo*, 108 Ala. 517, 18 South. 664. Upon the evidence contained in the record, even if fraud on the part of the shipper had been set up by the pleas in accordance with ⁴²⁵ the principle above stated, we could not say that the court in rendering judgment for the plaintiff erred.

With respect to the nature of the property and its value the plaintiff was the only witness examined, and he testified: "I know the manuscript for the loss of which this suit is brought. There were four hundred pages of legal cap paper in it, hand-written (written with pen and ink). It was bound by a binder whom I had to bind it in a book form. It opened at the end and had a cover on it. In June, 1897, I decided to spend as much time as was necessary in preparing data and in writing the history of the development of South Carolina literature. I went into the libraries all over the state. I studied with older literary men in the state. I had access to the libraries belonging to these men, and can give you the names if you like. In the manuscript I divided the development of literature into five periods—colonial, revolutionary, state's rights, secession, and last quarter of the nineteenth century. I wrote the history of each period, and gave the lines of the representative writers of each period, and I annotated the choicest productions of these representative writers. I gave three years to the preparation of that manuscript. I closed the work in 1900, when I sent it to the school of graduate studies of the Columbia University, my alma mater. I spent most of my afternoons, my time at night, and during most of the time I made repeated trips on Saturday when my college work was over for the week to libraries over the state, and spent as much time in these

libraries as I could in order to get back to my work the following Monday morning." After testifying as above, plaintiff was asked by his counsel this question: "From the time and labor devoted by you to the preparation of this manuscript, and the contents of it, the matter contained in it, what would you say was the reasonable value of that manuscript?" Objection was made to the question on the ground that it called for testimony that was incompetent, illegal, and irrelevant. The objection was overruled, and the witness answered: "Five hundred dollars for three years, or fifteen hundred dollars." On cross-examination ⁴²⁶ plaintiff testified: "It would be hard for me to say what the market value of the package was in open market, other than its value on the subject, as there was no such text-book written. When I speak of this fifteen hundred dollar valuation I mean it was of that value to me. It is impossible for me to say what the market value of the package was, or what I could have gotten for it in dollars and cents. I never put it on the market as a manuscript, but had arranged to publish it as a text-book. I believe it had a market value, but it was never offered. I could not state any distinct market value, but I believe it had a market value. I do not know what market value it had."

Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way, and from such elements as are attainable: *Trustees of Howard College v. Turner*, 71 Ala. 429, 46 Am. Rep. 326; *Cooney v. Pullman Car Co.*, 121 Ala. 368, 25 South. 712, 53 L. R. A. 690; *Jones v. Noel*, 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862; *Masterton v. Mayor and Council of Brooklyn*, 7 Hill (N. Y.), 61, 42 Am. Dec. 38; *Sullivan v. Lear*, 23 Fla. 463, 11 Am. St. Rep. 388, 2 South. 846; 3 *Sutherland on Damages*, 3d ed., sec. 919. The case of *Boucher v. Shewan*, cited by appellant, involved the value of pamphlets that had been converted by the defendant. It was insisted that they

were such as treated the Christian religion scoffingly, and, therefore, had no literary value. The court said: "Admitting it to be true that the pamphlets are of the character represented, it may be that they cannot ⁴²⁷ and ought not to be valued as of the value of pamphlets." But there can be no reason why the materials or paper contained in what are called "pamphlets" may not be held by the plaintiff as property, independent of what is printed in them: 14 U. C. C. P. 419. This is no authority for holding that, if the pamphlets had been legitimate ones, their value to plaintiff as literary productions could not have been assessed. Indeed, the opinion of the court shows that such damages might have been assessed.

Where the article lost has no market value, the rule of damages seems then to be its value to the plaintiff; and in ascertaining this value inquiry may be made into the constituent elements of the cost to the plaintiff in producing it: *Green v. Boston R. Co.*, 128 Mass. 221, 35 Am. Rep. 370; *Louisville etc. R. Co. v. Stewart*, 78 Miss. 600, 29 South. 394, and authorities *supra*. The court seems to have followed the rule as above stated. The plaintiff in the case testified to the value, and his was the only evidence, and we have not been shown that the court erred in its finding as to the value: *Cooney v. Pullman Car Co.*, 121 Ala. 368, 25 South. 712, 53 L. R. A. 690.

There is no error in the record, and the judgment must be affirmed.

Weakley, C. J., and Haralson and Dowdell, JJ., concur

A *Common Carrier* may, by special contract, limit his liability for the loss of goods intrusted to him for transportation, but not to the extent of exempting him from responsibility for his negligence: *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170; *Atlantic Coast Line R. R. Co. v. Dexter*, 50 Fla. 180, 111 Am. St. Rep. 116. A common carrier may make a valid agreement with a shipper as to the value of property to be transported, and thus limit his liability for loss to the amount agreed upon: *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170. But the limitation must be reasonable and the value agreed upon must bear some proportion to the actual value: *Southern Express Co. v. Marks*, 87 Miss. 656, 112 Am. St. Rep. 466; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955. See the discussion of this entire subject in the note to *Chicago etc. R. R. Co. v. Calumet Stock Farm*, 88 Am. St. Rep. 74.

EBERSOLE v. DANIEL.

[146 Ala. 506, 40 South. 614.]

JUDGMENT, Merger by—Splitting of Causes of Action, What is not.—The giving of a promissory note for a part of a sum due for materials sold and delivered, and the subsequent taking of judgment for the amount of such note, do not, where there is evidence that the note was taken in payment of the account, preclude the plaintiff from afterward maintaining an action for the balance due. The cause of action accruing at the maturity of the note is not the same as that resting on the balance of the account, and recovery therefor may be had without splitting the cause of action. (p. 54.)

A. Latardy, for the appellant.

John Vary and Henry Upson Sims, for the appellee.

⁵⁰⁷ **WEAKLEY, C. J.** Daniel sued Ebersole on the common counts for a sum of money claimed to be owing for deliveries of brick and sand. The amount claimed was the aggregate of all the items of the account running through a series of months, without regard to payments made or to a note for one hundred dollars, which the defendant had given the plaintiff on account. The defendant first filed two pleas—the general issue, and a plea setting up that defendant had paid plaintiff on account, “first, a note for one hundred dollars, on which plaintiff has instituted suit in this court for a balance due thereon of sixty dollars,” and also “that defendant had paid plaintiff one hundred and fifty-seven dollars and fifty cents,” which several sums the defendant, by the plea, offered to set off against any amount which plaintiff might show to be due him for brick and sand delivered.

Although in form a plea of setoff, the foregoing would ⁵⁰⁸ seem to be in substance a plea of partial payments, and he had the benefit thereof in this case. Later the defendant filed a third plea, since the last continuance, whereby he interposed the defense, which he claims to have proven, and upon which he relies to justify the affirmative charge in his behalf, which he requested, and which the lower court refused; this ruling of the city court forming the predicate for the single assignment of error. In substance the said plea averred that upon a day named, in a cause between the parties, in the same court, the plaintiff recovered against the defendant a judgment for eighty-five dollars and twenty cents, which he had paid, and that the present action and the one in which said

recovery was had "are for one and the same obligation resting on this defendant in favor of this plaintiff, arising out of the sale and delivery to this defendant of certain brick and sand sold by the plaintiff to the defendant." The proof, without conflict, showed that the recovery in the other case was had upon the note of the defendant, given and credited upon the account, for which the present suit was brought; and the defendant himself testified that after deducting said note and payments from the amount he admitted having owed the plaintiff, there yet remained due to the plaintiff the sum of one hundred and ninety-nine dollars and ninety-two cents.

We do not concur in the contention that this suit and the other were for "one and the same obligation," in the language of the plea. The obligations were separate and distinct. It is not claimed that the note was accepted and given in full satisfaction of the account, but that to allow a recovery at all in this case, even for the balance admitted to be owing, after deducting the amount of the note and payments—such reduced amount being that for which the plaintiff actually obtained judgment in the record before us—would be an unauthorized splitting up of the plaintiff's cause of action. The question, then, is whether a creditor may accept from his debtor by open account a note as a partial credit or payment and recover on the note in a suit against the maker, the note being unpaid at maturity, and thereafter recover a judgment for the balance of the account. Or, to state ⁵⁰⁰ it differently, does a creditor, taking a note as a partial credit upon an account, lose or abandon the balance of his claim by enforcing satisfaction of the note by suit? It would certainly require very clear and direct authority to induce us to hold that consequences so disastrous would follow such a common and innocent proceeding. The authorities cited by counsel for appellant do not sustain his proposition. They but assert the familiar rule that a single and entire cause of action may not be split up into two or more suits: *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387, 4 South. 426; *South & N. A. R. R. Co. v. Henlein*, 56 Ala. 368; *O'Neal v. Brown*, 21 Ala. 482.

In *Oliver v. Holt*, 11 Ala. 574, 46 Am. Dec. 288, also relied on, it was held that a running account, entirely due, constituted but a single cause of action, and that a suit and recovery of judgment for part of an account is such an abandon-

ment of the residue that no action can afterward be maintained upon it. That authority is not applicable to this controversy. There is evidence to the effect that the note was taken as payment upon the account. When the note was not paid at maturity, and the residue of the account was not discharged when due, the plaintiff had two separate and distinct causes of action, supportable by different evidence, and the recovery upon the note was no obstacle to obtaining a judgment for the residue of the claim. Although this suit was brought for the whole amount of the account, as originally contracted, the defendant had the right, of which he availed himself, to plead his payments and thus prevent a recovery for an excessive sum. The larger claim did not render the present suit one for the same obligation; that was enforced in the action upon the note, within the rule against splitting up a single cause of action. A just and proper result was reached in the lower court, and its judgment will be affirmed.

Tyson, Simpson and Anderson, JJ., concur.

A Judgment for a part of an entire demand is a conclusive bar to another suit for another part of the same demand: Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867; Alie v. Nadeau, 93 Me. 282, 74 Am. St. Rep. 346.

JONES v. BAXTER.

[146 Ala. 620, 41 South. 781.]

SHERIFF, Authority of Beyond the County—Attachment.—The sheriff of one county has no authority to levy an attachment and seize property thereunder situate in another county, and on motion, the levy should be discharged. (p. 55.)

FORTHCOMING BOND, When not Enforceable.—If the levy of an attachment is void because made by the sheriff of a county other than that in which he finds the property, the execution of a forthcoming bond to get possession of the property taken from him under the void levy does not validate it, nor prevent him from obtaining relief by making a motion to have the levy discharged as void. (p. 56.)

Espy & Farmer, for the appellant.

Reid & Hill, for the appellee.

620 HARALSON, J. This is an attachment suit commenced by R. M. Jones, the appellant, on the third day

of September, 1904, against Z. M. C. Baxter, the appellee. ⁶²¹ The suit was issued out of the circuit court of Houston county, and was forwarded to the sheriff of Geneva county to be levied, and when the sheriff of Geneva received it, he went out of Geneva into Houston county, and, on the 8th of that month, levied the writ on a growing crop situated in the latter county. On the 9th of the month, Baxter executed and delivered to the sheriff a bond replevying the property attempted to be levied on, took it into his possession, and never returned it to the sheriff. The defendant was a nonresident of the state, and when the Houston court convened, he appeared by his attorneys, specially for the motion, and moved the court to have the attachment dissolved and the levy dismissed. The plaintiff demurred to this motion on the grounds: (1) That the sheriff of Geneva county had the authority to levy on property situated in Houston county, under and by virtue of said attachment, returnable to the circuit court of the latter county; (2) the levy was not void; and (3) because the said motion fails to set forth any facts which showed that the levy which is sought to be assailed is void.

The court sustained the demurrer to the second and third grounds of the motion, and overruled it as to the first ground.

The plaintiff filed a plea to the said motion, fully set out on page 5 of the record. The defendant moved to strike said plea, which motion was granted.

On the trial of the motion to vacate and discharge the levy, the facts as stated above in the beginning of this opinion were shown without conflict, and the court granted the motion and entered judgment discharging and dismissing the levy made under the attachment.

It thus appears that the single question is presented, whether the court erred in discharging said levy, and that depends upon whether the sheriff of Geneva county had any right or authority to go out of his own county into Houston county and levy the attachment in his hands on property situated wholly in the latter county.

It is stated in Freeman on Executions, section 104, that "The execution may be regular, and in all respects valid when ⁶²² it was issued, and yet not authorize its service by the officer to whom it is delivered. By the rules of the common law, the writs of each court are only capable of enforcement within the territorial limits of its jurisdiction. . . .

So, when intrusted with the execution of a writ of his own county, the officer must remember that his authority under the writ is confined to the county. He has no legal power to levy on lands or property outside of the county. The acts of an officer outside of his county or bailiwick are unofficial and necessarily void unless expressly or impliedly authorized by some statute." In this state we have no statute applicable to sheriffs to take them out of this common-law rule. The foregoing principle, as stated by Mr. Freeman, is supported as appears in his notes to the text by the decisions of the courts of many of the states.

Mr. Herman, in discussing what levies are void, says: "levy made on property that is not subject to levy on execution is void," and gives instances of such, the last one which is, "A levy upon property outside of the district county of the officer holding the execution": Herman on Execution, sec. 168; *Street v. McClerkin*, 77 Ala. 580; *Stephens v. Wright*, 111 Ala. 579, 20 South. 622. The court committed no error in discharging and dismissing said levy.

We are cited to the case of *Peebles v. Weir*, 60 Ala. 41 opposed to the rulings of this court. That case holds the execution of a replevy bond by the defendant, in an attachment case, is sufficient to sustain a judgment against his default. That decision is justified, on the grounds as stated, that by the execution of the bond the defendant comes a party to the suit, as do his sureties, so far that execution may issue against them, if the plaintiff is successful in the suit, and fails to return the property to the custody of the proper officer. But the execution of a forth bond by a defendant to gain the possession of his property taken from him under a void levy cannot have the effect of validating the levy, and would not deprive the defendant making his motion to get rid of the void levy; otherwise he would be deprived of the possession and use of his property unlawfully taken from him under a levy which was void and which had no more effect upon defendant's right of possession of it than if it had not been made. The forth bond was itself void as a statutory bond, because it could not support out a valid levy to sustain it.

The ruling of the court below is approved.

Affirmed.

Weakley, C. J., and Dowdell and Denson, JJ., concur.

In Attachment Proceedings the rest must be within the jurisdiction of the court issuing the process in order to confer jurisdiction: *Douglas v. Phoenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448.

DIXON v. STATE.

[147 Ala. 91, 41 South. 734.]

INDICTMENT FOR INCEST—Failure to Charge that the Other Party was a Woman.—An indictment charging that J. D., a man, being the father of C. D., a girl, did have sexual intercourse with such C. D. is not defective in not charging that she was a woman, nor in failing to state her age. (p. 57.)

INCEST.—It is not Necessary to Sustain a Prosecution for Incest that the Female should have Reached the Age of Puberty. (p. 58.)

Indictment and conviction of incest, and an appeal by the defendant.

E. E. Newton, for the appellant.

Massey Wilson, attorney general, for the state.

HARALSON, J. The statute against incest is: "If any man, and woman" (within the prohibited degrees) have sexual intercourse together, etc., they must, on conviction, be punished as herein prescribed: Code 1896, sec. 4889. The indictment charges that "John Dixon, a man, being the father of Callie Dixon, a girl, and within the (prohibited) degree of consanguinity, etc., did have sexual intercourse with the said Callie Dixon," etc. There was a demurrer to the indictment in substance that it does not charge that the defendant had sexual intercourse with a woman; did not aver that Callie Dixon was a woman, nor did it state her age, whether under or over ten years, etc.

The contention of the defendant is, that the indictment is defective in the use of the word "girl," instead of the word "woman"; that the term "woman" is a female who has passed the age of puberty, while a girl may not have passed that age.

This distinction is without force, unless the crime of incest cannot be committed with a female who has not passed the age of puberty. We apprehend that the offense may be com-

mitted, at least by the man, on a female within the prohibited degree, without respect to her age.

An indictment alleged: "Walter Butler did assault Delia McCall, a woman, with the intent forcibly to ravish ⁹³ her." The proof showed that Delia McCall was a girl, eleven years of age. The defendant was convicted, and this court held that there was no variance for that between the allegations and proof. The defendant asked the charge: "Unless the jury believe from the evidence that Delia McCall had reached the age of puberty, there can be no conviction in this case," which charge was refused, and, as held by us, properly so: *Butler v. State*, 120 Ala. 668, 25 South. 1024.

In *King v. State*, 120 Ala. 329, 25 South. 178, the indictment was in code form, except in the substitution of the words "a girl under the age of ten years" for the word "woman," used in form 12 charging an assault on a woman with intent forcibly to ravish her, and it was held that it sufficiently charged an offense under section 4346 of the Code of 1896, making it an offense to commit "an assault on another" with intent to ravish. The distinction attempted to be drawn is too technical to be meritorious.

No other error is raised and insisted on in the record. The demurrer was properly overruled.

Affirmed.

Weakley, C. J., and Dowdell and Denson, JJ., concur.

The Crime of Incest is the subject of a note to *Tagert v. State*, 111 Am. St. Rep. 19.

KNIGHT v. STATE.

[147 Ala. 93, 41 South. 850.]

SEDUCTION—Evidence of the Consent of the Prosecutrix to have Sexual Intercourse with Another.—In a prosecution for seduction, evidence that the prosecutrix consented to have sexual intercourse with a witness under examination is not admissible, the act not having been consummated. (p. 59.)

SEDUCTION.—Evidence of the General Character of the Prosecutrix for Chastity is admissible where evidence has been offered tending to impeach her character for chastity. (p. 59.)

SEDUCTION—Question for the Jury.—If the prosecutrix described how the act was accomplished, it is for the jury to determine from the evidence whether she finally yielded under temptation or otherwise, and the court should not charge the jury to find for the defendant. (p. 59.)

No counsel marked for the appellant.

Massey Wilson, attorney general, for the state.

94 SIMPSON, J. The defendant in this case was convicted of the crime of seduction. The exception to the question to the witness Windham as to whether the prosecutrix had ever consented to have sexual intercourse with him was properly sustained, the act not having been consummated. Evidence having been offered tending to impeach the chastity of the prosecutrix, it was proper to admit testimony as to her general character for virtue and chastity: *Smith v. State*, 107 Ala. 139, 18 South. 306; *Suther v. State*, 118 Ala. 88, 24 South. 43.

There was no error in the refusal of the court to give the general charge requested in favor of the defendant. 95 Under section 4972 of the Code of 1896 the case was properly triable in Pike county, and there was evidence to justify a verdict of guilty.

There was no error in the refusal of the court to give charge 2, requested by the defendant. The prosecutrix, on cross-examination, described how the act was accomplished; and it was for the jury to determine, from all the evidence, whether the prosecutrix finally yielded under temptation or otherwise, as mentioned in the statute. In addition, this matter was fully placed before the jury in the most favorable light to the defendant by charges given by the court at the request of defendant.

The judgment of the court is affirmed.

Weakley, C. J., and Haralson and Denson, JJ., concur.

Seduction as a Criminal Offense is discussed in the notes to *Bradshaw v. Jones*, 76 Am. St. Rep. 659; *State v. Carron*, 87 Am. Dec. 405. If the statute creating the crime of seduction makes no reference to the chastity of the woman, the state is not required to allege and prove it: *Caldwell v. State*, 73 Ark. 139, 108 Am. St. Rep. 28. But see *Greenman v. O'Riley*, 144 Mich. 534, 115 Am. St. Rep. 466. Evidence of her general reputation for chastity is admissible: *State v. Lockerby*, 50 Minn. 363, 36 Am. St. Rep. 656; *Carroll v. State*, 74 Miss. 688, 60 Am. St. Rep. 539. As to evidence of the promise to marry, see the recent case of *State v. Ring*, 142 N. C. 596, 115 Am. St. Rep. 759.

HARGROVE v. STATE.

[147 Ala. 97, 41 South. 972.]

EVIDENCE—Trailing of Dogs.—After evidence as to the nature and training of dogs, the testimony of a witness may be received as to their trailing of a defendant accused of crime. (p. 60.)

EVIDENCE—Tracks and Defendant's Shoes.—Evidence that the tracks of the defendant's shoes corresponded in length and width with the tracks found at the scene of the crime is admissible. (p. 61.)

JURY TRIAL—General Charge in Favor of the Defendant, When Properly Refused.—A general affirmative charge cannot be given when the evidence affords an inference adverse to the party requesting the charge. (p. 61.)

M. K. Clements, for the appellant.

Massey Wilson, attorney general, for the state.

⁹⁸ DOWDELL, J. The defendant was tried and convicted on an indictment charging him with the crime of burglary.

There are three questions presented for our consideration. The first is on the action of the trial court in overruling the motion of the defendant to exclude "all the evidence of the witness, Lee Davidson, in reference to alleged trailing of the defendant by the dogs." It was shown by this witness that he owned two bloodhounds, and "was in the business of running bloodhounds," and that the two dogs were trained to trail human beings. This witness further testified that one of the dogs had had four years' training, and that the other dog was two years old, "and had experience also," and that "these dogs had trailed sixty or seventy persons in the last four years." With this evidence as to the nature and training of the dogs, the testimony of this witness in reference to the trailing of the defendant by the dogs was competent and admissible under the ruling in the case of *Hodge v. State*, 98 Ala. 10, 39 Am. St. Rep. 17, 13 South. 385. See, also, *Little v. State*, 145 Ala. 662, 39 South. 674.

⁹⁹ The second question is on the action of the court in overruling the defendant's motion to "exclude the evidence of the witness Labe Westmoreland in reference to the tracks." This witness testified "that he got a pair of shoes at the house of the defendant the night that the dogs went to the defendant's house, and after the defendant was arrested, and that some tracks that were found near Warten's store and near where the cash drawer was found, were the same length and

width as the shoes found in the defendant's house." The witness further testified "that these shoes were put into the tracks found in the rear of Warten's lot, where the cash drawer was rifled, and they were the same length and width as these tracks." The defendant admitted, when being examined as a witness in his own behalf on the trial, that the shoes were his, and that he wore them on the day of the night of the burglary. The evidence as to the tracks was competent and relevant, and the court committed no error in overruling the motion to exclude: 1 Mayfield's Digest, sec. 421½, p. 333.

The third question raised is based on the refusal of the court to give the general charge requested in writing to find in favor of the defendant. It has often been ruled by this court that the general affirmative charge cannot be given, when the evidence affords inference adverse to the party requesting the charge. In such a case the question becomes one for determination by the jury. The evidence in the case before us offered inference of the defendant's guilt, and the court, therefore, properly refused the charge. We find no error in the record and the judgment will be affirmed.

Weakley, C. J., and Haralson and Denson, JJ., concur.

The Questions Involved in the Principal Case were recently before the supreme court of North Carolina: See *State v. Hunter*, 143 N. C. 607, 118 Am. St. Rep. 830, and authorities cited in the cross-reference note thereto.

MONTGOMERY v. PERRYMAN & CO.

[147 Ala. 207, 41 South. 848.]

GUARDIAN AND WARD, Application of the Former to the Court for Instructions.—The guardian of a non compos mentis who executes a mortgage under a decree of court has the same right to apply to it for instructions, if they are necessary to the execution of his trust, as is accorded to trustees. (p. 63.)

WHEN A GUARDIAN'S SALE is Made Under a Decree, the Court must be Regarded as the Vendor. (p. 63.)

A GUARDIAN'S SALE, Until Confirmed by the Court Authorizing it, confers no rights, whether the sale is public or private. (p. 63.)

GUARDIAN'S MORTGAGE, Reformation of.—A mortgage executed by a guardian upon a ward's property when the property is not described in the decree authorizing the mortgage, and the mortgage is not confirmed by the court, is invalid. Hence, if it does not correctly describe the property intended to be mortgaged, it cannot be reformed and foreclosed in equity. (p. 63.)

George Huddleston, for the appellant.

L. C. Dickey and James A. Mitchell, for the appellee.

209 TYSON, J. The bill in this cause was filed to reform a mortgage executed by the guardian of a non compos mentis under the decree of the city court of Birmingham in equity. The decree authorized the guardian to borrow the sum of three hundred dollars to be used by the guardian in paying the taxes and other necessary and proper expenses of his ward, and further authorizing him, if necessary, to secure the payment of such loan by the execution of a mortgage on such part of the ward's estate as should be reasonable security for the payment of the note for the sum borrowed. The decree further provided that the cause in which it was rendered should be continued, that **210** such orders and decrees might be made therein as should seem meet and proper. No other orders or proceedings were had, and on the thirteenth day of November, 1893, the city court of Birmingham rendered a decree dismissing said cause.

It appears from the bill that W. W. Montgomery, the non compos, owned two lots, Nos. 13 and 14, in block 9, in J. W. Montgomery's addition to Wood Lawn, Alabama. On lot 13 there were some improvements, but lot 14 was unimproved and was worth in the year 1892, when the mortgage was executed, only about twenty-five dollars. The guardian borrowed three hundred dollars from Mrs. M. E. Jennings, securing the same by a mortgage to her conveying, with other property, lot 14, whereas lot 13 was intended. The sufficiency of the averment showing the mistake is not questioned. The bill further avers that the money borrowed was used for the benefit of the ward, as provided in the decree; that a mortgage upon lot No. 13, with the other property embraced therein, was a reasonable security, and not more than a reasonable security, for the loan, and that lot No. 14, and said other property, was in no sense a reasonable security therefor. The mortgage as executed was duly foreclosed, the mortgagee buying in the property at the foreclosure sale; the mortgagee going into possession of lot No. 13 and using the same as his own. Thereafter on the fourteenth day of October, 1894, Mrs. Jennings executed a deed to complainant to lot No. 13 for the sum of five hundred dollars; complainant going into possession of lot No. 13 thereunder, and improving same

the extent of six hundred and fifty dollars. R. B. Montgomery, the succeeding guardian, and the non compos mentis, were made parties defendant; the latter demurring to the bill by his guardian ad litem.

The guardian of the non compos, who executed the mortgage under the decree of the city court of Birmingham in equity, had the same right to apply to such court for instructions and authority necessary in the execution of his trust as is accorded to others trustees. The title to the real estate of the ward is not in the guardian, but in the ward, and in the case of a sale thereof under ²¹¹ a decree of the court of chancery the court is the vendor. In such case "until confirmed by the court it is not complete and confers no rights": *McEachin v. Warren*, 82 Ala. 554, 9 South. 197. This is true, whether the sale is public or private. A mortgage of the ward's property depends for its efficacy upon the transfer of title, and unless the property to be mortgaged is described in the decree, or when the selection of the property is left to the guardian, unless the mortgage is confirmed by the court, its approval is in no way manifested, so as to make the mortgage its act. In such case the mortgage is invalid and confers no rights, even if the property intended to be covered is correctly described therein. It cannot, therefore, be made valid by means of mistake in such a description. The bill shows that the property of the non compos intended to be mortgaged was never designated by a decree of the court; but the selection thereof was left to the guardian, and no confirmation by the court is shown. The mortgage, therefore, confers no rights, and cannot be made the basis of a bill for the correction of a mistake therein. In short, there is lacking that essential element of mutuality between the owner of the property or anyone authorized to bind him and the mortgagee upon which to found the reformation or correction: *Stephenson v. Harris*, 131 Ala. 470, 31 South. 445; 6 *Pomeroy's Equity Jurisprudence*, sec. 675 et seq.

The demurrer interposed to the bill should have been sustained. A decree will be here entered, reversing the decree appealed from and sustaining the demurrer.

Reversed and rendered.

Weakley, C. J., and Simpson and Anderson, JJ., concur.

Mortgages by Guardians of the property of their wards are discussed in the note to *Schmidt v. Shaver*, 89 Am. St. Rep. 314.

HAYS v. BOUCHELLE.

[147 Ala. 212, 41 South. 518.]

VENDOR AND VENDEE—Duty of Delivering Possession.—It is the duty of a vendor either to put his vendee in possession of, or to point out the boundary lines of, the lands conveyed, or, at least, to permit him by a proper survey to ascertain the correct boundary. (p. 65.)

EQUITY JURISDICTION to Settle Boundaries.—If the owner of adjoining sections of land conveys one of them without describing its boundaries, having previously permitted the corners and boundaries between the sections to be lost or destroyed, of which fact his grantee at the date of the purchase was ignorant, and after the conveyance prohibits the grantee by threats and violence from ascertaining the corners and boundary, a suit may be maintained in equity to ascertain and declare such boundary. (p. 65.)

Mayfield & Verner, for the appellant.

Harwood & McKinley, for the appellee.

214 DOWDELL, J. The appeal in this case is prosecuted from the decree of the chancellor overruling the defendant's demurrer to the complainant's bill. The purpose of the bill is to establish the boundary of the land in question, which the bill alleges has been obliterated and become confused. In an elaborate note by Mr. Freeman to the case of *Stuart's Heirs v. Coalter*, reported in 15 Am. Dec. 745, where many cases bearing on the subject are cited, the equitable doctrine in regard to the confusion of boundaries has been ably reviewed and in a most exhaustive manner, and from this review of the authorities the doctrine may be well stated as follows: The jurisdiction of chancery to establish disputed boundaries of land is ancient and well defined; but it is not an original or independent jurisdiction, and "it is accordingly settled, as laid down in the principal case, that a court of chancery will not undertake to settle obscured or confused boundaries of land unless some equity is superinduced by the act of the parties or of those through whom they claim": See authorities cited in note on page 746 of the above case.

According to the averments of the bill in the case at bar, the respondent, being the owner of sections 20 and **215** 21, which she had owned and been in possession of for thirty years, sold and conveyed section 20 to the complainant, a copy of which deed is attached as an exhibit to the bill. By this deed, in the description of the land conveyed, no bound-

aries are given, but the land is merely described as being "all of section 20" in a certain township and range in Greene county, Alabama. The bill avers that during the time that said two sections of land belonged to the respondent, or those under whom she derived her title, the corners and boundary line between said sections were lost, obliterated and destroyed; that such loss, obliteration or destruction of said corners and boundaries were caused and allowed by the design, act or negligence of respondent, or of those under whom she claimed said lands; that said corners and boundaries were lost and obliterated at the date on which respondent sold and conveyed said land to complainant, but that the complainant was then ignorant of this fact. The bill further avers that the respondent has been, since the sale by her of said section 20 to complainant, the owner of said section 21, and is still the owner thereof; that the respondent did not at the date of said sale point out to complainant the corners and boundaries of said land sold him, and has not since that date done so, although complainant has requested her so to do. The bill further shows, by its averments, that the complainant employed the country surveyor of Greene county for the purpose of locating and ascertaining the boundary line between section 20 and 21, but was prohibited by the respondent, through her agents, by threats of violence, from ascertaining and locating the corners and boundary line between said sections 20 and 21.

It was undoubtedly the duty of the respondent to have put the complainant in possession of the land, which she had sold and conveyed to him, and likewise a duty to have pointed out the boundary line of the land so conveyed, or at least to have permitted her grantee by a proper survey of the land so conveyed to ascertain the correct boundary. We are clearly of the opinion that, if the allegations of the bill are true as to the acts and ²¹⁶conduct of the respondent, when taken in connection with the averments as to the obliteration and confusion of the boundary line, then the equity of the bill under the authorities is put beyond all question, and the case is one that calls for the interposition of a court of chancery. The acts and conduct of the respondent, charged in the bill in equity, amount to a fraud upon the rights of the complainant, and is such an equity, superinduced by the act of the party, as gives the court jurisdiction under the authorities above re-

ferred to. We think the doctrine laid down in our own case of *Ashurst v. McKenzie*, 92 Ala. 484, 9 South. 262, and *Guice v. Barr*, 130 Ala. 570, 30 South. 563, are authorities in support of the complainant's bill. Our conclusion is that the chancellor properly overruled the demurrer, and his decree will be here affirmed.

Weakley, C. J., and Haralson and Denson, JJ., concur.

SUITS TO ASCERTAIN AND DECLARE BOUNDARIES.

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I. History.

The origin and history of the jurisdiction exercised by courts of equity to settle confused boundaries are quite obscure. All that can be affirmed with certainty is, that the jurisdiction has long been exercised, and all doubt of the propriety of exercising it in proper cases, if it ever existed, terminated at so early a date as to require no present consideration: 1 Story's Equity Jurisprudence, secs. 610, 611; Pomeroy's Equity Jurisprudence, sec. 1384; *Wake v. Conyers*, 1 Eden, 331; 2 Lev. Cas. in Eq. 433; *Speer v. Cawter*, Meriv. 416; *Watkins v. Childs* (Vt.), 66 Atl. 805. At one time the court seems to have assumed jurisdiction and to have granted relief in every case in which, because boundaries were lost or obscured, some relief was desirable: *Mullineux v. Mullineux*, Tuthill, 39; *Peckering v. Peckering*, Tuthill, 39. But, as we shall hereafter show, this broad assumption of jurisdiction cannot be sustained, and courts of chancery will remain inactive notwithstanding some remedy may be desirable unless some equitable ground for their interposition is established. In the United States, as we shall also hereinafter show, the jurisdiction has been modified and extended by statute in many of the states.

II. Mere Uncertainty or Confusion of Boundary not Sufficient.

The fact that the owners of adjacent lands may not agree respecting one or more of their boundaries, and that for some reason their location must remain in question until settled by some adjudication between the claimants, does not authorize a court of equity to as-

same jurisdiction of the subject matter. Probably the court may exercise jurisdiction by consent of the parties: *Madison v. Wallace*, 2 J. J. Marsh. 581; so that its decree, though erroneous, would not be void. It is, however, beyond controversy, that, as against any objection, a court of equity cannot act, unless its jurisdiction has been conferred by statute, merely because the boundary is confused, uncertain, or unknown. In such a case, if one of the claimants is in possession of the parcel to which the uncertainty relates, the other may seek redress by an action to recover possession, and where neither party is in possession, relief may doubtless be had, in many of the states, by a suit to determine conflicting claims of title. When either of these remedies is available and adequate, there can be no relief in equity by a suit brought solely for the purpose of settling the boundaries: *Ashurst v. McKenzie*, 92 Ala. 484, 9 South. 262; *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464; *Livingston C. B. & L. Assn. v. Keach*, 219 Ill. 9, 76 N. E. 72; *McCreery L. I. Co. v. Myers*, 70 S. C. 282, 49 S. E. 848. Nor will the nonexistence or inadequacy of other remedies alone induce a court of chancery to act. In other words, the uncertainty of the boundary and the necessity for making it certain are not in themselves independent and sufficient grounds for equitable interposition unless made so by statute. There must be some act on the part of the defendant or his predecessors in interest, or some default of duty on his or their part, sufficient to invoke the jurisdiction of the court: *Hayes v. Bouchelle*, 147 Ala. 212, ante, p. 64, 41 South. 518; *Wetherbee v. Dunn*, 36 Cal. 249, 85 Am. Dec. 166; *Perry v. Pratt*, 31 Conn. 433; *Wolcott v. Robbins*, 26 Conn. 236; *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464; *Pendry v. Wright*, 20 Fla. 828; *Fraley v. Peters*, 12 Bush, 469; *Scott v. Means*, 80 Ky. 460; *Walker v. Leslie*, 90 Ky. 642, 14 S. W. 682; *Kilgannon v. Jenkinson*, 51 Mich. 240, 16 N. W. 390; *Bressler v. Pitts*, 58 Mich. 347, 25 N. W. 311; *Wilson v. Hart*, 98 Mo. 618, 12 S. W. 249; *Humboldt County v. Lander County*, 22 Nev. 248, 58 Am. St. Rep. 750, 38 Pac. 578, 26 L. R. A. 749; *Wolfe v. Scarborough*, 2 Ohio St. 361; *Norris' Appeal*, 64 Pa. 275; *Tillmes v. Marsh*, 67 Pa. 507; *Hale v. Darter*, 5 Humph. 79; *Topp v. Williams*, 7 Humph. 569; *Nye v. Hawkins*, 65 Tex. 600; *Stuart v. Coalter*, 4 Rand. 74, 15 Am. Dec. 731; *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415; *Hill v. Proctor*, 10 W. Va. 59; *Cresap v. Kemble*, 26 W. Va. 603; *Watson v. Ferrell*, 34 W. Va. 406; 12 S. E. 724; *Eakin v. Taylor*, 55 W. Va. 652, 47 S. E. 992; *O'Hara v. Strange*, 11 Ir. Eq. 262; *Miller v. Warmington*, 1 Jac. & W. 484, 21 R. R. 217; *Pomeroy's Equity Jurisprudence*, sec. 1384. It is probable that a mistake resulting in the erroneous location of a boundary will not sustain a bill to settle it, where the party against whom relief is sought has not been guilty of any fraud nor otherwise chargeable with the mistake: *Harrod v. Cowan*, Hard. 542. In truth, relief is sometimes spoken of as merely incidental to some relief granted upon another and independent ground of action: *Le Conte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238.

It is not sufficient that there be a confusion of boundaries and also an equity in favor of the plaintiff. It must further be an equity assertable against the defendant. Thus the confusion may have resulted from some fraud, or from some neglect of duty on the part of a tenant or other person who should have kept the boundary marked and certain. Yet if the defendant is an adverse claimant in no way connected with him whose fraud or neglect obliterated the boundary or made it uncertain, the complainant must seek relief by some other proceeding: *Miller v. Warmington*, 1 Jac. & W. 492; *Speer v. Crawter*, 2 Meriv. 410; *Stuart v. Coalter*, 4 Rand. 74, 15 Am. Dec. 731; *Lange v. Jones*, 5 Leigh, 192. If the case is not one of equitable cognizance, the want of jurisdiction may be suggested with effect at any stage of the proceedings, and hence may be raised, for the first time, on appeal: *Robinson v. Moses* (Va.), 34 S. E. 48.

III. General Grounds for Assuming Jurisdiction.

Conceding, as we must, that it is not alone the confusion of uncertainty of a boundary that requires the assumption of jurisdiction by a court of equity to settle it, we are next led to the inquiry on what may the jurisdiction safely rest. The answer to the inquiry is, in general terms, that there must be some act or default on the part of the persons against whom relief is sought, or on the part of one from whom he has acquired his title, by which the boundary has become lost, confused or uncertain, and such act or default being established or admitted, the suit will be entertained. Hence relief may be granted against a party who at various times removes the fences or other monuments existing between his land and that of the complainant, and thereby encroaches on the latter's land and renders the boundary line confused, uncertain or obliterated: *Guice v. Barr*, 120 Ala. 570, 30 South. 563; *Watkins v. Childs* (Vt.), 66 Atl. 805. Where the parties to a conveyance identify the subject thereof by locating a mill-race, but one of them afterward takes away the dam at the head of the race, and filling it up, plows over it in defiance of the remonstrances of the other, the latter is entitled to relief in equity in a suit to settle the boundaries: *Merriman v. Russell*, 2 Jones Eq 470.

If a person is in possession as a tenant of any estate less than in fee and himself owns adjacent lands, it is his duty to keep distinct the boundary between the lands which he holds in his own right and those which he holds as tenant, whether for years or life, and if he fails in this duty, he becomes subject to a suit to establish such boundary and make it certain: *Spike v. Harding*, 47 L. J. Ch. 323, 7 Cl. D. 871, 38 L. T. 285, 26 Week. Rep. 420; *Attorney General v. Stephen*, 6 De Gex, M. & G. 111, 25 L. J. Ch. 888, 2 Jur., N. S., 51, 4 Week. Rep. 191; *Pomeroy's Equity Jurisprudence*, sec. 1385. In truth, cases of this class furnish the most frequent and best settled illustration of the conditions in which it can be said that a party has the duty

to keep distinct and visible the boundary between his land and that of another person, and the jurisdiction of courts of equity, except where extended by statute, is almost confined to cases of this class, and where, as in the principal case, jurisdiction is exercised over a case belonging to a different class, its exercise may often be regarded as questionable.

The proceeding in equity to settle confused or uncertain boundaries was not designed for the purpose of establishing title. In truth, as a general rule, title is not involved, and certainly a suit is not maintainable where its object is merely to settle the title to disputed property: *Lange v. Jones*, 5 Lea, 192. It has sometimes been said that the title is not involved: *Evans & Howard F. B. Co. v. St. Louis etc. R. Co.*, 48 Mo. App. 636; and cannot be determined: *Sprigg v. Kooper*, 9 Rob. (La.) 248; *Love v. Morrill*, 19 Or. 545, 24 Pac. 916; *Miner v. Caples*, 23 Or. 303, 31 Pac. 655; *King v. Brigham*, 23 Or. 262, 31 Pac. 601, 18 L. R. A. 361. If this is true, in the strict sense of the terms employed, then necessarily the denying of the title of the complainant must either result in the dismissal of his bill or a direction that resort be had to some proceeding at law to settle the title, and such resort must have resulted in the settling of the legal title before equity will undertake to ascertain and settle the boundary, and yet no suit in which such resort was required has come within our observation. It would appear to be impossible to conduct or litigate the suit without calling title in question and thus creating a necessity for determining it. The complainant cannot be entitled to settle the boundary unless he has title to the land of which the boundary in question is one of the limits, and his failure to establish such title calls for the dismissal of his suit: *Booth v. Buras*, 104 La. 614, 29 South. 260; *Godfrey v. Littell*, 1 Russ. & M. 59. Whatever may be the rule where the court is called to act without the aid of any statute, the American statutes are doubtless intended to create an efficient remedy not requiring a resort to two or more courts or proceedings, and authorize a determination of adverse claims of title so far as necessary to affording complete relief: *Stadin v. Helin*, 76 Minn. 496, 79 N. W. 537, 602.

This proceeding resembles an action of ejectment in one particular, namely: it must appear that the plaintiff is not in possession of some part of the land sued for. This seems strange, for if the defendant is in possession, the plaintiff usually has a remedy at law; while if the plaintiff is out of possession, it is clear he has no such remedy. Nevertheless, so far as the decisions speak upon the subject, they affirm that if it appears that the complainant is in possession of all that he claims, he has no right to call upon a court of equity to settle his boundaries: *Ashurst v. McKenzie*, 92 Ala. 484, 9 South. 262; *Wilson v. Hart*, 98 Mo. 618, 12 S. W. 249; *Godfrey v. Littell*, 2 Russ. & M. 630, 31 R. R. 79; *Attorney General v. Stephens*, 6 De Gex, M. & G. 111, 25 L. J. Ch. 888, 2 Jur., N. S., 51, 4 Week. Rep. 191; though

the English cases cited in support of this rule do not seem to us to be necessarily in point: *Godfrey v. Littell*, 2 Russ. & M. 630, 31 R. R. 79; *Attorney General v. Stephens*, 6 De Gex, M. & G. 111, 25 L. J. Ch. 888, 2 Jur., N. S., 51, 4 Week. Rep. 191.

In the next place, it must appear that the boundary was at one time certain. Otherwise no one could have been guilty of any fraud, neglect, or default in confusing or rendering it uncertain: *Hough v. Martin*, 2 Dev. & B. Eq. 379, 34 Am. Dec. 403; *Aborn v. Smith*, 11 R. L. 594. We are not sure that the decision in the principal case does not conflict with this rule, and *Zeringue v. Harang*, 17 La. 349, assumes that the court may act when the boundaries of contiguous tracts have never been separated. If one of the parcels has been conveyed by the defendant to the plaintiff without settling the boundaries between them, and the defendant refuses to permit the line to be run, probably the bill may be sustained. Such was the decision in the principal case, and while the ground of jurisdiction is not in it very clearly stated, in another case it has been said that the suit may be regarded as in the nature of one for specific performance, and may hence be sustained: *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612. Furthermore, it must be established that the boundaries have become confused or uncertain. They are not so confused or uncertain if the line can be in part discovered and therefrom the balance can be located by applying well-settled principles of law: *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612.

IV. Relief as Incident to a Suit Maintainable on Some Other Grounds.

Where there is some other ground of equitable jurisdiction, the court may also, as an incident of the suit, grant relief by settling or re-establishing confused boundaries. Thus where the boundary is confused, and because of it the complainant is likely to be exposed to the necessity of maintaining or defending a multiplicity of suits, there are several dicta to the effect that a suit to settle the boundary is maintainable: *Wetherbee v. Dunn*, 36 Cal. 249; *Humboldt County v. Lander County*, 22 Nev. 248, 58 Am. St. Rep. 750, 38 Pac. 578, 26 L. R. A. 749; *DeVeney v. Gallagher*, 20 N. J. Eq. 33; *Watkins v. Childs (Vt.)*, 66 Atl. 805; *Pomeroy's Equity Jurisprudence*, sec. 1385; and in a few cases the question has been necessarily considered and determined. Thus in *Beatty v. Dixon*, 56 Cal. 619, the complaint named nineteen persons as defendants, and alleged that the plaintiff and the defendants were owners in severalty of a certain tract of land, the boundaries of which, through lapse of time and the carelessness of the occupants and the absence of natural boundaries, had become confused and uncertain; that the boundary lines of the entire tract and those of the several subdivisions had become obliterated, so that no one of the defendants is occupying according to his original claim, the defendants all occupying lands contiguous to

the plaintiff and thereby encroaching on his land. A decree in favor of the complainant appointing a commissioner to survey and fix the boundaries was sustained, for the reason "that the action affects a large number of persons, and that by proceeding in equity to determine the controversy, a multiplicity of actions at law will be avoided." So, where there was a threat by the defendant to tear down and remove a part of complainant's dwelling, and the latter sought an injunction, and the real issue between the parties respected their boundary, the court assumed jurisdiction, saying: "A man shall not be disturbed by force in his dwelling-house until the title is settled, which can be done and the possession recovered by ejectment. This court will grant the relief, provided it is made to appear that the complainant has the right. Under the general prayer for relief, the complainant is entitled to such relief as his case may require. Courts of equity have long entertained jurisdiction, in cases of confusion of boundaries, to establish lines; and although they never entertain a simple suit to fix boundaries between individuals, where courts of law have jurisdiction, yet when the question is, as here, connected with the matters that require the interference of equity, they will, to prevent multiplicity of suits, entertain jurisdiction, and settle the boundary: 1 Story's Equity Jurisprudence, secs. 609, 621. The court, in this case, will ascertain the boundary to settle whether the complainant is entitled to the continuance of its protection by injunction": *De Veney v. Gallagher*, 20 N. J. Eq. 33.

V. The Existence of a Remedy at Law.

Suits to settle boundaries are subject to the general rule that equity will not assume jurisdiction where the remedy at law is adequate. Hence, though parties dispute respecting the location of the boundary between their lands, yet ordinarily, if the question is triable in an action of ejectment and by the recovery the plaintiff will be granted full relief, he must resort to such action: *Livingston C. B. & L. Assn. v. Keach*, 219 Ill. 9, 76 N. E. 72; *McMillin v. McMillin*, 7 T. B. Mon. 560; *Kittell v. Jensen*, 37 Neb. 685, 56 N. W. 487; *Higbee v. Camden & A. R. & T. Co.*, 20 N. J. Eq. 435; *McCreery L. & L. Co. v. Myers*, 70 S. C. 282, 49 S. E. 848; *Sloan v. King*, 33 Tex. Civ. App. 537, 77 S. W. 48. Hence the suit cannot be maintained on the ground that the plaintiff has acquired title by prescription: *Wolcott v. Robbins*, 26 Conn. 236.

VI. Parties to the Suit.

In the absence of a statute prescribing a different rule, the suit may be brought and maintained by an owner or part owner of the property, the line of which is sought to be ascertained and established, and as the proceeding is not regarded as one for the establishment of title, it is apparently sufficient that the plaintiff is rightfully in possession of the tract, the boundary of which is in dispute or uncertain: *Sprigg v. Hooper*, 9 Rob. (La.) 248; *Cushing v. Miller*, 62

N. H. 517. It is probable that a suit may be maintained by one county against another for the purpose of ascertaining the boundary between them, but if so, the jurisdiction is subject to the same limitations as when a suit is brought by one private proprietor against another: *Humboldt County v. Lander County*, 22 Nev. 248, 58 Am. St. Rep. 750, 38 Pac. 578, 26 L. R. A. 749. In a state where the proceeding is statutory, and the statute purports merely to authorize an owner to institute such a proceeding, a county cannot maintain it for the purpose of establishing the boundary of a public road, when the county is not the owner thereof, its only interest in the land being in the nature of an easement: *Dickinson County v. Fouse*, 118 Iowa, 393, 83 N. W. 804.

As to parties defendants, it is clear that the well-settled equitable principle that they should include all persons interested as land owners in the line proposed to be established, and this whether their estates are in possession, reversion or remainder, in severalty or as co-tenants. Otherwise the decree when entered could not accomplish the object sought by the proceeding: *Rollins v. Davidson*, 84 Iowa, 237, 50 N. W. 1061; *Pope v. Melone*, 2 A. K. Marsh. 239; *Watkins v. Childs* (Vt.), 66 Atl. 805; *Atkins v. Hatton*, 2 Anstr. 386; *Rayley v. Best*, 1 Russ. & M. 659. If all necessary parties are not made defendants at the institution of the suit, the court may order the requisite parties to be brought in, so that in the end a complete determination may be made and the doubtful boundary conclusively settled: *Rock v. Denora Min. Co.*, 91 Minn. 259, 97 N. W. 889. It may be that the establishment of the boundary may incidentally affect persons whose lands are not contiguous to the complainant's; that is to say, the defendant, if it be established that what he claims as his line must be moved in a particular direction, may, in turn, claim that another of his boundaries should be changed correspondingly and in changing it, that an encroachment must be made on the land claimed and possessed by one who is not a party to the suit. This does not require that such third person be made a party defendant. If it did, the latter might make a similar claim respecting some other person, and the process of bringing in new parties might become interminable. At all events, it is settled that incidental claims of persons who do not possess or claim lands adjacent to the disputed line do not require them to be made parties defendant, nor can the defendant call his vendors in warranty nor require them to be made parties: *Kennedy v. Niles* (Iowa), 96 N. W. 772; *Duplessis v. Lastrapade*, 11 Rob. (La.) 451.

VII. The Pleadings.

What constitutes a sufficient pleading must, whether the suit is controlled by the general principles of equity jurisprudence or by some statute modifying or enlarging them, be determined by considering what constitutes a good cause of action or of defense. The complaint must state facts from which, if they are either conceded

or established, the court may properly grant the plaintiff relief: *Smith v. Scoles*, 65 Iowa, 733, 23 N. W. 146; and when it does so, the bill or complaint is sufficient: *Rock v. Denora Min. Co.*, 91 Minn. 259, 97 Minn. 889. If, on the other hand, it merely shows trespasses by the defendant, and that he has slandered complainant's title, it is insufficient: *Scott v. Means*, 80 Ky. 460. Both according to the equity practice and that under the statutes of the several states, the defendant must answer: *Harrah v. Conley*, 82 Ill. 48; but in North Carolina an affidavit containing a denial of the facts alleged by complainant may be treated as an answer: *Scott v. Kellum*, 117 N. C. 664, 23 S. E. 180.

Any title which the complainant had in the property in dispute may have been extinguished by an adverse holding ripening into title by prescription. Therefore the answer may plead prescription, or the statute of limitations, and such plea being made, the court cannot, without committing error, strike out or otherwise disregard it: *Goodwin v. Garibaldi* (Ark.), 102 S. W. 706; *Stadin v. Helin*, 76 Minn. 496, 79 N. W. 537, 602; *Love v. Morrill*, 19 Or. 545, 24 Pac. 916; *Dice v. McCauley*, 22 Or. 456, 30 Pac. 160; *School Dist. v. Price*, 23 Or. 294, 31 Pac. 657. It is said that the rule is otherwise under statutory proceedings in Iowa, and that in such proceedings adverse possession cannot be pleaded: *Mitchell v. Wilson*, 70 Iowa, 332, 30 N. W. 588. This statement may be technically correct, but, if so, it is misleading. For what the court is called to determine is what was the boundary at the commencement of the proceeding, and in making this determination, it is not restricted to an inquiry respecting the original survey lines or other boundary, but must consider whether the boundary had been changed by adverse possession and prescriptive title flowing from it, and a boundary shown to have been maintained for the time and under the circumstances required to create a prescriptive title, but must be found and declared to be the true boundary: *Davis v. Curtis*, 68 Iowa, 66, 25 N. W. 932; *Williams v. Tschantz*, 88 Iowa, 126, 55 N. W. 202; *Neary v. Jones*, 89 Iowa, 556, 56 N. W. 675.

VIII. The Mode of Proceeding with the Inquiry—Commissioners.

The court does not proceed to at once take evidence upon the issues formed by the proceedings, and therefrom determine the location of the disputed boundary. "In a suit to ascertain boundaries, the decree generally directs a commission to issue for that purpose. It may, however, direct the question to be tried before the court itself with or without a jury, or before a court of common law. A commission to settle boundaries partakes very much of the same nature as a commission in partition; it is nearly in the same form, and is sued out, executed and returned, and the certificate of the commissioners is objected to, confirmed or questioned, in the same manner. There is, however, frequently this difference between commissions to ascertain

boundaries and commissions of partition, namely, that, in the case of a partition, the thing to be divided is clearly ascertained and described; whereas in the case of boundaries, it is often impossible for the commissioners to ascertain them with sufficient certainty to set them out. Where, however, it is through the default of a tenant or copyholder that boundaries are confused, the court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be cut out as shall be equal to the quantity originally granted or leased. In such case the commissioners must proceed accordingly. The decree, in a suit to settle boundaries, does not order mutual conveyances as in the case of partition, but directs that, after the lands have been set out, the defendant is to deliver possession thereof to the plaintiff, and that the plaintiff and his heirs are to hold and enjoy the same against the defendant, or any person or persons claiming under him. The further consideration of the suit is generally reserved until after the return of the commission or trial of this question. When, therefore, the commissioners' certificate has been confirmed absolutely, the cause must be set down for hearing on further consideration, in the usual manner': Daniell's Chancery Practice, 6th Am. ed., 1163, 1164.

IX. The Judgment.

The final judgment, as in the case of partition, is ordinarily the confirmation of the report of the commissioners. It may also, as is the case in a suit for partition, contain such further order or direction as may be necessary to afford full relief upon the facts appearing to, and expressly or impliedly found by, the court. Thus, as we have already seen, when the boundary cannot be ascertained, the defendant may be required to make good to the complainant as from a common fund his proper quantity of land out of the land of which the defendant has possession: *Watkins v. Childs* (Vt.), 66 Atl. 805; *Ashton v. Lord Exeter*, 6 Ves. 288; *Leeds v. Stratford*, 4 Ves. Jr. 180; and where the boundaries as held have been accepted and acquiesced in by the parties in interest, but do not conform to the conveyances under which they acquired their title, such conveyances may, upon a sufficient showing, be reformed and the boundary ascertained and fixed in one proceeding and by one decree: *Deidrich v. Simmons*, 75 Ark. 400, 87 S. W. 649.

The judgment or decree cannot bind any person not before the court. Hence if against a husband, the decree cannot settle a boundary of his wife's land, when she was not a party thereto: *Durst v. Amyx*, 12 Ky. Law Rep. 246, 13 S. W. 1087.

X. Statutes.

In several of the states, statutes have been enacted not merely recognizing the right to ascertain and establish boundaries, but also in many respects enlarging and extending the jurisdiction of the

courts. Thus in Connecticut, "whenever the boundaries of lands between two or more adjoining proprietors have been lost, or by delay, accident or other cause shall have become obscure or unascertained, and the adjoining proprietors cannot agree to establish the same, one or more of such adjoining proprietors may bring his petition in equity, in the superior court for the county in which such lands, or a portion of them, are situate, and such superior court as a court of equity may, upon such petition, order such lost and uncertain boundary to be ascertained and established, and for that purpose may appoint a committee," etc.: *Perry v. Pratt*, 31 Conn. 433. Under this statute the court is not bound to confirm the report of the committee, but may dismiss the bill when the facts reported will not support a decree in favor of the complainant. A boundary must be regarded as uncertain if it "has lost its distinctive character as such by removal, displacement, decay, or change, so that it no longer answers the purpose of a boundary in defining a true line. It is immaterial whether it be a natural or an artificial boundary": *Perry v. Pratt*, 31 Conn. 433; *West Hartford Ecc. Soc. v. First Baptist Church*, 35 Conn. 117; *Hollister v. Hollister*, 35 Conn. 241.

In Georgia a proceeding called processioning has long been authorized, under which persons known as processioners proceed to mark out the boundaries of tracts of land: *Watson v. Bishop*, 69 Ga. 51; *Christian v. Weaver*, 79 Ga. 406, 7 S. E. 261; *Amos v. Parker*, 88 Ga. 754, 16 S. E. 200. It was formerly their duty to trace and mark anew the lines around the entire tract, but under the more recent statutes their duties have been restricted to some particular line which is desired to be re-established: *Gillis v. Taylor*, 127 Ga. 676, 56 S. E. 992. These processioners are appointed by the ordinary of the county, and every land owner has the right to apply to them to appoint a day when a majority of them, with the county surveyor, will trace and mark out the lines of his land. Ten days' notice must be given to the owners of adjoining lands, if resident in the state, and the surveyor must make out a certificate of his survey and deliver it to the owner, and such certificate constitutes prima facie evidence in future controversies. Adjoining lot owners, if dissatisfied with the lines as run, may file a protest with the processioners, who must return the papers to the clerk of the superior court, who must enter the same on the issue docket, and an issue must be made up, tried, and determined by a verdict of the jury and the judgment of the court: Ga. Code, ed. 1895, secs. 3243-3249.

By the statutes of Illinois enacted in 1869 for the permanent survey of lands, but subsequently repealed, a proceeding somewhat similar to that authorized by the statute of Georgia was provided, except that the officers under whose direction the survey was made were called commissioners: *Martz v. Williams*, 67 Ill. 306; *Allmon v. Stevens*, 68 Ill. 89; *Faucher v. Tutwiller*, 76 Ill. 194; *Atkins v. Huston*, 106 Ill. 492.

In Indiana an owner of land may, on giving ten days' notice to the owners of adjoining lands of his desire to establish, relocate, and perpetuate any corner or line of his land, procure the county surveyor to make the required surveys and locations. The surveys made upon such notice are made prima facie evidence of the correctness of the lines and corners established by them, and an appeal may be taken to the circuit court, and it may approve or reverse the survey, and upon reversal direct a new survey to be made by any other competent person whom the court may designate, from whose decision an appeal may be taken in like manner: Burns' Ann. Stats. Ind., ed. 1901, secs. 8024-8030. The party appealing must assume the burden of proving the survey to be incorrect: Findley v. McCormick, 50 Ind. 19; McGinnis v. Boyd, 144 Ind. 393, 42 N. E. 678; Bennett v. Simon, 152 Ind. 490, 53 N. E. 649; but if no appeal is taken within the time prescribed by statute, or, if taken, the survey is declared correct by the court, it becomes conclusive on the parties: Burns' Ann. Stats. Ind., ed. 1901, secs. 8024-8030; Herbst v. Smith, 71 Ind. 44; Grover v. Paddock, 84 Ind. 244; Hunter v. Eichel, 100 Ind. 463; Sinn v. King, 131 Ind. 183, 31 N. E. 48; but it does not divest a party of title acquired by prescription: Wingler v. Simpson, 23 Ind. 201; Riggs v. Riley, 113 Ind. 208, 15 N. E. 253.

In Iowa, "when one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, destroyed, or disputed boundaries or corners, or part thereof, are situated against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners and boundaries ascertained and publicly established. If any public right is likely to be affected, the proper county shall be made defendant." Notice of the action must be given to the defendants as in other cases, and pleadings must be filed by the respective parties. The court must appoint a commission of one or more designated surveyors, "who shall at a date and place fixed by the court in the order of appointment proceed to locate the lost, destroyed, or disputed corners or boundaries." The commissioners may hear witnesses and make report of their proceedings to the court. Exceptions to the report may be filed by any person interested. The court must hear the exceptions and approve or modify the report, or refer the matter to another commission for further report. The corners and boundaries as thus established are final on the parties: Iowa Ann. Code, ed. 1897, secs. 4228-4236; Nesselroad v. Parish, 52 Iowa, 269, 3 N. W. 45; Gates v. Brooks, 59 Iowa, 510, 6 N. W. 595, 13 N. W. 640; Mitchell v. Wilson, 70 Iowa, 332, 30 N. W. 588; Anderson v. Peterson, 74 Iowa, 482, 38 N. W. 386; Bohall v. Neiwalt, 75 Iowa, 109, 39 N. W. 217; Walrod v. Flannigan, 75 Iowa, 365, 39 N. W. 645; Plank v. Reinhart, 81 Iowa, 757, 46 N. W. 1005; Yokum v. Haskins, 81 Iowa, 436, 46 N. W. 1065; Tooman v. Hidlebaugh, 83

Iowa, 130, 49 N. W. 79; Rollins v. Davidson, 84 Iowa, 237, 50 N. W. 1061; Doolittle v. Bailey, 85 Iowa, 398, 52 N. W. 337; Neary v. Jones, 89 Iowa, 556, 56 N. W. 675.

The statutes of Kansas also enable any owner or occupant of lands to procure a survey thereof by the county surveyor for the purpose of permanently establishing their corners and boundaries, after notice to owners of adjacent lands, and have a survey and report thereof. A right of appeal to the district court exists, which may approve or modify the survey or refer it back to the surveyors to be corrected in accordance with the decision of the court. The corners and boundaries, when an appeal is not taken, or, if taken, when the survey is approved by the court, must be regarded as the permanent corners and boundaries of the tract surveyed: Kan. Gen. Stats., ed. 1905, secs. 1894-1897; Schwab v. Stoneback, 49 Kan. 607, 31 Pac. 142.

Several other states have also by statute authorized proceedings for ascertaining and settling lost or unknown boundaries: Andrews v. Knox, 10 La. Ann. 604; Booth v. Buras, 35 La. Ann. 552; Kittell v. Jenssen, 37 Neb. 685, 56 N. W. 487; Parker v. Taylor, 133 N. C. 103, 45 S. E. 473; Stanaland v. Rabon, 140 N. C. 202, 52 S. E. 417; Love v. Morrill, 19 Or. 545, 24 Pac. 916; King v. Brigham, 23 Or. 262, 31 Pac. 601, 18 L. B. A. 361; Aborn v. Smith, 11 B. I. 594. In these statutes the restrictions upon the right existing according to the practice in equity are generally dispensed with, and the moving party is not denied relief on the ground that neither the defendant nor those under whom he claims have been guilty of any fraud, default, or neglect of duty by reason of which the confusion or uncertainty in the boundary has arisen: Love v. Morrill, 19 Or. 545, 24 Pac. 916; King v. Brigham, 23 Or. 262, 31 Pac. 601, 18 L. B. A. 361. There are also statutes in a few of the states authorizing the appointment of fence viewers, and giving them jurisdiction over controversies respecting the erection and maintenance of fences upon boundary lines, but the proceedings of such viewers are not regarded as being for the establishment of disputed boundaries: Boyd v. Shoop, 107 Iowa, 10, 77 N. W. 482; Camp v. Camp, 59 Vt. 667, 10 Atl. 748. By the American statutes efficient proceedings are for the first time authorized for ascertaining and conclusively locating disputed boundaries. Under them it is not essential to allege or prove anything except the ownership or possession by claimant of the tract claimed, and that some boundary of it is uncertain or unknown. Thus a remedy is provided which relieves without further strife, either in or out of court, a situation which otherwise must lead to violence or litigation, and often to both, whereas the decisions made in the absence of statutes of this character are remarkable for the unanimity with which they affirm the jurisdiction of equity to act in a proper case, and then with too close an approach to unanimity assert that, though the boundary in question is uncertain, the facts disclosed do not justify the court in removing the uncertainty.

REYNOLDS v. LAWRENCE.

[147 Ala. 216, 40 South. 576.]

PLEADING—Amendment of Complaint, When not a Departure. The amendment of a bill to enforce a vendor's lien seeking to make clear the lands intended to be conveyed by explaining the description contained in the deed is not a departure from the cause of action stated in the original bill. (p. 79.)

CONVEYANCE, Construing in Case of Patent Ambiguity.—If an ambiguity is patent on the face of a deed, parol evidence of intention is not admissible, but the instrument must be construed by the court, and it is entitled to the whole of the circumstances surrounding the parties, to enable it to determine the property intended to be conveyed. (p. 79.)

CONVEYANCE—Parol Evidence to Aid in Construing.—Where the lands are described in the conveyance as S. $\frac{1}{2}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of a designated section, parol evidence is admissible to prove that all of the lands thus described were intended to be in the N. W. $\frac{1}{4}$ of such section. (p. 79.)

CONVEYANCE—Construction by Reference to Number of Acres Specified.—If part of the lands conveyed are described as "S. $\frac{1}{2}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, sec. 29," and the conveyance states that the whole of the lands amount to one hundred and sixty acres, the deed must be construed as conveying the south half of the northwest quarter of the section, for otherwise it would embrace much more than the number of acres specified. (p. 80.)

VENDOR AND VENDEE, Right of the Former to Enjoin Waste.—If a vendor has a lien for unpaid purchase money, he is entitled to enjoin the cutting of timber. (p. 80.)

VENDOR'S LIEN—Limitation of Actions.—The ten year statute of limitations of Alabama does not apply to suits to enforce vendor's liens. (p. 80.)

PRACTICE—Joinder of Parties.—The original purchaser and all subpurchasers may be joined in a suit to enforce a vendor's lien. (p. 80.)

APPEAL AND ERROR.—An assignment that the court erred in its decree overruling the demurrer of the respondents and a motion to strike out parts of the complaint is too general. (p. 81.)

APPEAL AND ERROR.—A motion to strike out parts of the complaint is addressed to the sound discretion of the court, and the refusal to grant it is not reversible. (p. 81.)

Burnett, Hood & Murphree, for the appellants.

Knox, Acker & Blackmon, for the appellee.

218 SIMPSON, J. This was a bill to enforce a vendor's lien and to enjoin the cutting of timber on a part of the land originally sold by Lawrence to the land company, **219** and on which the lien is claimed, as the S. $\frac{1}{2}$ and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Sec. 29, T. 9, R. 70 W.; also the S. $\frac{1}{2}$ of S. W.

$\frac{1}{4}$ of N. W. $\frac{1}{4}$, Sec. 23, T. 9, R. 10; also an undivided half interest in S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Sec. 28, T. 9, R. 10; and the deed attached as an exhibit gives the same description. The amendment to the bill seeks to explain this description by alleging that the lands conveyed were the S. $\frac{1}{2}$ (of the N. W. $\frac{1}{4}$) and the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of said section 29; also claims that an inspection of the original deed, which is in the possession of defendants, will make the matter clear, and seeks to require defendants to produce it. The amendments, seeking to make clear the lands intended to be conveyed, did not constitute a departure from the cause of action as stated in the original bill.

The only ambiguity which is claimed to exist is from the description of the land as "the S. $\frac{1}{2}$ and the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Sec. 29," and the amendment seeks to make it clear that the S. $\frac{1}{2}$ referred to the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and not the S. $\frac{1}{2}$ of the section. While it is a correct general principle of law that, if an ambiguity is patent on the face of the deed, it cannot be made certain by parol proof as to what was the intention of the parties, but the instrument must be construed by the court, yet the court is entitled to the light of all the circumstances surrounding the parties, in order to enable it to determine the property intended to be conveyed by the deed. This has been called an intermediate class, partaking of the nature of both patent and latent ambiguity; and this court, speaking through Justice Stone, has clearly expressed this distinction, in a case where lands were described by government numbers, yet failed to state in what county or state they were situated, and proof was permitted to be made of the fact that the party making the deed was living in a certain county in Alabama, on lands answering to said description: *Chambers v. Ringstaff*, 69 Ala. 140. See also, *Moody v. Alabama G. S. Ry.*, 124 Ala. 195, 26 South. 952; *Webb v. Elyton Land Co.*, 105 Ala. 471, 18 South. 178.

In addition to the above principle, which admits of proof which may make the description of this land clear, ²²⁰ the language of the deed itself is persuasive to show that the construction given to it as set out in the amendment is correct, to wit, the deed, as alleged, states that the land conveyed contains one hundred and sixty acres. To construe the S. $\frac{1}{2}$ as meaning the S. $\frac{1}{2}$ of the section would include a great deal more land than that, while if we construe it to

mean the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, it will make just one hundred and sixty acres, if the undivided half interest in S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 28 be considered as twenty acres. While it is true that it is not technically correct to say that a person who owns an undivided half interest in forty acres owns twenty acres, yet that is really what his interest amounts to, and for the purpose of harmonizing all the parts of the deed it is proper to suppose that the draftsman so understood it: *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. 551; *Davis v. Hess*, 103 Mo. Supp. 31, 15 S. W. 324.

The general purpose of the amendment is the same as that of the original bill, and there is no such variance, either in the allegations or in the relief sought, as would constitute a departure.

There is no merit in the cause of demurrer that complainant had an adequate remedy at law. This court has recognized the equity of a mortgagee, or a vendor with a lien for purchase money, to restrain waste in similar cases: *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146; *Coker v. Whitlock*, 54 Ala. 180.

The statute of limitations of ten years has no application to a bill for the enforcement of a vendor's lien: *Phillips v. Adams*, 78 Ala. 225.

There is no merit in the cause of demurrer that there was a misjoinder of parties, as all subpurchasers of parts of the land are proper parties to a bill to enforce the vendor's lien on the entire tract.

As to the cause of demurrer that the owners of N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 29 are not made parties, the original bill alleges that the land covered by the deed is owned and claimed by the First National Bank of Rome, Georgia, R. T. Dorsey, and John H. Reynolds, and they are made parties to the bill. In the amendment to the third section of the original bill it alleges that Dorsey, Vandyke, ²²¹ and Reynolds became purchasers at the foreclosure sale, and that Vandyke sold some interest in said lands to said First National Bank of Rome and B. I. Hughes, but made no deed to them, and that Vandyke still holds the legal title to some interest in the land. Said Vandyke and Hughes are also made parties defendant. So there is no merit in this assignment. Whatever part was not sold by Dorsey and Vandyke remained in them.

The assignment of error that "the court erred in its said decree overruling the demurrer of respondents and their motion to strike parts of said bill of complaint" is too general. The demurrers have been considered, and the motion to strike is addressed to the sound discretion of the court, and the refusal to allow it is not revisable error: *Ashford v. Ashford*, 136 Ala. 631, 96 Am. St. Rep. 82, 34 South. 10; *Davis v. Louisville etc. R. R. Co.*, 108 Ala. 660, 18 South. 687.

The judgment of the court is affirmed.

Weakley, C. J., and Tyson and Anderson, JJ., concur.

A Vendee in Possession under an executory contract for the sale of land in which the vendor retains the title may be enjoined from committing waste by cutting timber, if the value of the land is thereby impaired: *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58. But an injunction will not lie if the value of the property is not impaired: *Small v. Slocumb*, 112 Ga. 279, 81 Am. St. Rep. 50. The right to an injunction against timber cutting by a trespasser is discussed in the note to *Moore v. Halliday*, 99 Am. St. Rep. 748.

TOWN OF NEW DECATUR v. SCHARFENBERG.

[147 Ala. 367, 41 South. 1025.]

MUNICIPAL CORPORATIONS—Streets, Change of Grade of, Injunction to Prevent Until Compensation is Made.—An injunction will issue to prevent a change of the grade of a street until compensation is first made, without reference to the solvency or insolvency of the municipality enjoined. (p. 83.)

MUNICIPAL CORPORATIONS—Streets, Change of Grade of, Right to Compensation, When not Waived.—By joining in a petition for the paving of a street in front of his property, an owner does not waive his right to damages which may result from a change of grade preparatory to such grading. (pp. 83, 84.)

MUNICIPAL CORPORATIONS.—A mandatory injunction to restore a street to its former condition is proper, where the municipality has entered upon a change of grade without compensating an abutting property owner. (p. 84.)

INJUNCTION—Motion to Dissolve.—New matter in an answer not responsive to the bill cannot be considered on a motion to dissolve the injunction. (p. 84.)

INJUNCTION, Dissolving on Security Being Given.—An injunction against the change of grade of a street without compensating an abutting property owner may be dissolved upon the making of a cash deposit by the municipality and the execution of a bond to cover probable damages. (p. 85.)

APPEAL AND ERROR—Review of Interlocutory Decree.—Under the code of Alabama an appeal lies to the supreme court from
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a decree overruling a plea to a bill, or, what is the same thing, holding it to be insufficient. In this way a judgment of the higher court may be obtained in advance of the taking of evidence or a hearing upon the merits. (p. 85.)

APPEAL AND ERROR.—The setting down of a plea for hearing upon its sufficiency admits the truth of the facts alleged therein, for the purpose of obtaining a judgment of the court upon the legal question whether the facts constitute a defense. (p. 85.)

PRACTICE IN EQUITY—Verification of Plea.—Unless some rule or statute requires it, the plea to a bill in equity need not be verified. (p. 85.)

PRACTICE IN EQUITY.—A Bill is not Barred for Duplicity if it does not contain two independent facts nor two separate states of facts, each constituting a sufficient answer to the bill. (p. 85.)

MUNICIPAL CORPORATIONS—Streets, Change of Grade of, Act Amounting to Waiver of Right to Injunction Against.—A property owner who consents to a change of the grade of a street, and thereby induces a municipality to incur expenses in and about the work, cannot obtain an injunction against the doing thereof. (p. 86.)

MUNICIPAL CORPORATIONS.—A Mandatory Injunction to Compel the Restoration of a Street to Its Former Condition may issue, though there has been no negligence in or about the work. (p. 86.)

A MUNICIPALITY has the Right to Change the Grade of a Street without compensating adjoining lot owners if no injury can result to their property. (p. 87.)

INJUNCTION Against Change of Grade of Street.—If an abutting property owner is or will be injured by a change of the grade of a street, he may restrain the further prosecution of the improvement of the street by a municipality until compensation is made to him for the injury done, or about to be done, to his abutting property. (p. 87.)

Suit against the town of New Decatur to prevent it from raising the grade of a street nearly two feet and thereby causing the plaintiff's store floor to be a foot and a half below the grade. An injunction was granted, and, upon a reference, damages of the complainant were ascertained and reported, and a decree was entered overruling the motion to dissolve the injunction for any ground other than the prepayment of the estimated damages. The town prosecuted the appeal.

Brown & Kyle, for the appellant.

E. W. Godby, for the appellee.

³⁶⁹ **WEAKLEY, C. J.** The bill was filed to enjoin the town of New Decatur from damaging complainant's store property by certain proposed changes in the ³⁷⁰ grades of the contiguous streets, upon the allegation that the municipality had not first paid complainant for the injury that would result, and to require the town to restore the streets to

their former condition. Upon the filing of the bill, a preliminary injunction was issued. The defendant filed a motion to dismiss for want of equity, a motion to dissolve the injunction, a demurrer, several pleas, and a sworn answer. The chancellor overruled the motion to dismiss the demurrer and held the special pleas insufficient. He also overruled the motion to dissolve the injunction unconditionally; but, in response to a prayer to that effect in the answer, ordered a reference to the register to ascertain the probable damages, and, on the coming in of the report, the payment of the ascertained sum into court, and the execution of a bond to pay such damage as the complainant might sustain, the chancellor dissolved the injunction: *Columbus R. R. Co. v. Witherow*, 82 Ala. 190, 3 South. 23.

Whatever may be the law elsewhere, it is too well settled in this state for further controversy "that, under constitutional guaranties, a municipal corporation may not take or injure the property of a citizen in the exercise of its power to improve its highways without first making compensation; and the right to injunctive relief in such a case as this exists without reference to the solvency or insolvency of the municipality and regardless of the consideration that he might recover full compensatory damages in an action at law": *City Council of Montgomery v. Lemle*, 121 Ala. 609, 25 South. 919; *Avondale v. McFarland*, 101 Ala. 381, 13 South. 504; *Niehaus v. Cooke*, 134 Ala. 223, 32 South. 728. We have, therefore, no doubt of the equity of the bill, unless its equity is destroyed by the allegations it contains respecting the petition by defendant and other citizens to the city council, wherein they requested the paving of Second avenue in front of complainant's property, and preparatory to which the change of grade and other work complained of had been ordered. We are not of opinion that the petition merely to pave the avenue³⁷¹ would be a waiver of damages growing out of the change in the grade of the highway, as set forth in the bill; such waiver of a constitutional right ought not to be lightly inferred, and cannot be clearly derived from the request to pave the avenue and the agreement to bear a part of the expenses of the paving: *Newville Road Case*, 8 Watts (Pa.), 172; *Barker v. City of Taunton*, 119 Mass. 392; *Birdseye v. Village of Clyde*, 61 Ohio, 27, 55 N. E. 169; *Jones v. Borough of Bangor*, 144 Pa. 638, 23 Atl. 252. As said by the supreme court of Massachusetts in *Barker v. City of Taunton*, 119

Mass. 392, "it is no bar to the claim for damages made by the petitioner that he was one of the original petitioners for the improvement—that alone is not evidence of an assent that his property shall be taken for public use without compensation." While the court uses the words "taken for public use," the facts of the case show that it was similar to the one before us, and that damages were claimed for injury to plaintiff's premises by lowering the grade in the construction of a sidewalk. There, also, the plaintiff had merely petitioned for the construction of a sidewalk. The complainant would also have the right, upon the averments of his bill, no compensation having been first made for the injury, to require the city to restore the street to its former condition, as well as to enjoin further acts of damages. A court of equity does not administer partial justice, but, taking jurisdiction in a proper case, ever seeks to conclude the whole controversy. The motion to dismiss the bill for want of equity was properly overruled. What we have said above also applies to and covers the questions presented by the demurrer, and in overruling this no error was committed.

The answer did not deny the averments upon which the equity of the bill rested, and new matter, not responsive to the bill, cannot be considered on motion to dissolve. The defendant was not entitled to an unconditional dissolution: *Niehaus v. Cooke*, 134 Ala. 223, 32 South. 728. The chancellor followed the practice approved by this court, and requested by the defendant, in dissolving the injunction upon the making of a cash deposit ³⁷² and the execution of the bond, thus allowing a public work to proceed, and the town has no cause of complaint against the ruling upon its motion to dissolve the injunction.

This leaves for consideration pleas 4, 5 and 6, assignments of error specifying these as having been erroneously held insufficient.

Pleas 4 and 5 present substantially the same question, and they may be considered together. A careful reading of the bill shows that the gravamen of the complaint is that the city is preparing to change the grade of the highway in front of complainant's property, without his consent and against his objection. So far as the work has proceeded, it has been done in pursuance of the plan to alter the grade, preparatory to laying the brick pavement on the elevated line; and the incidental consequences, alleged in the bill, showing the modum

of the injury, are all attributed to the execution of the purpose by the city to establish a new grade for the highway. The question, therefore, is whether under the averments of pleas 4 and 5 the complainant was entitled to restrain the proposed work, or, upon the hearing, if these pleas should be proven, ought to have a decree for compensation. By section 427 of the Code of 1896 an appeal lies to this court from a decree by the chancellor overruling a plea to a bill, or, what is the same thing, holding it to be insufficient; in this way, the judgment of this court may be obtained upon the sufficiency of a defense in an equity case interposed by plea, in advance of the taking of evidence, or a hearing upon the merits: *Glasser v. Meyrovitz*, 119 Ala. 152, 24 South. 514. Several separate pleas may be filed or they may be incorporated in the answer, in which latter event they must be treated as independent pleas. The setting down of a plea for hearing upon its sufficiency operates as an admission of the truth of all the facts alleged for the purpose of invoking the judgment of the court upon the legal question whether these facts constitute a defense to the bill: *Tyson v. Decatur Land Co.*, 121 Ala. 414, 26 South. 507; *Glasser v. Meyrovitz*, 119 Ala. 152, 24 South. 514. Unless there is some rule or statute requiring it, pleas need not be verified by affidavit; these before us are not open to objection, because no one swears to their truth.

If duplicity be a ground of objection to a plea in equity, it is not under our system in the case of a plea in a court of law (*Bolling v. McKenzie*, 89 Ala. 470, 7 South. 658; *Corpening v. Worthington*, 99 Ala. 541, 12 South. 426); yet we are of opinion the pleas now under consideration are not double. They do not contain two independent facts, nor two separate sets of facts, each constituting a sufficient answer to the bill. We have already held that the petition for the paving did not, in and of itself, operate to waive the complainant's right to damages, or his equity to restrain the work until compensation should be paid or secured to him for the injury to his storehouse and lot under the practice of the chancery court in cases like this. The averments of the plea in respect of the petition for paving, and the decision of the city council to do the work, are matters of inducement leading up and converging to the one defense which they bring forward. This defense is that the complainant on being informed as to the proposed change of grade, and with knowledge of the new

curb line, requested the city officials in charge of the work to proceed with the work, saying he intended to raise his house anyway, and that he wished the street properly fixed while they were about it, so there would be no trouble concerning the street thereafter; and that the defendant, acting upon the declaration and conduct of the complainant, had gone to much expense in preparing the avenue to be paved according to the plans of the engineers, and had rendered itself liable for the payment of large sums for laborers and teams engaged to plow up the street and prepare it for the brick pavement.

The important question, then, is whether a citizen who consents to a change of grade, requests that the change be made, and who thereby induces the city to incur expense in and about the work, can recover damages to his property because of the altered grade, or arrest the ³⁷⁴ doing of the work in the midst of it, upon the ground that compensation for the injury had not first been paid him.

It has been expressly held that a person asking for the change of grade cannot complain; the case being within the maxim, "*volenti non fit injuria*": *Cross v. Kansas City*, 90 Mo. 13, 59 Am. Rep. 1, 1 S. W. 749. When a person has consented to the act being done he may not exercise his legal right in opposition to that consent: *Morris C. & B. Co. v. Lewis*, 12 N. J. Eq. 323. And this court, in *Goetter v. Norman*, 107 Ala. 585, 19 South. 56, has expressed its approval of the rule as quoted by Mr. Story from a decision of the house of lords: "It is a general law that if a man either by words or conduct has intimated that he assents to an act which has been done and that he will not offer opposition to it, although it could not have been lawfully done without his consent, and he thereby induces another to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have given faith to his words, or to the fair inference to be drawn from his conduct." A constitutional provision affecting simply property rights may be waived by the citizen: *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *Cooley's Constitutional Limitations*, 7th ed., 250. Whether the facts set up by the fourth and fifth pleas be called a "waiver or an estoppel," we are of opinion they constitute a defense to the bill, and that the chancellor erred in holding them insufficient.

The sixth plea proceeds upon the theory that having the power to grade and pave streets, the absence of negligence in and about the work would defeat the right of the complainant to have the street restored to its former condition. It is not upon the want of power to grade, nor upon the existence of negligence, that the equity of the bill rests. It rests upon the constitutional guaranty to the citizen against the taking or injuring of his property without prior compensation. The sixth plea was insufficient, and the chancellor's decree to that effect was not erroneous.

³⁷⁵ The decree of the chancellor, in so far as it holds 4 and 5 to be insufficient, will be reversed and a decree will be here rendered declaring them sufficient. In all other respects his decree will be affirmed. The cause will be remanded. Let the costs of the appeal accruing in this court and the city court be divided equally between the parties.

Affirmed in part, reversed and rendered in part, and remanded.

Tyson, Simpson and Anderson, JJ., concur.

TYSON, J. (on Rehearing). I do not construe the averments of the bill as resting the equity sought to be enforced upon an injury to complainant's interest in the avenue or street, but to his storehouse and lot abutting thereon. It is undoubtedly the law that the city has the legal right to change the grade of the street without compensation to adjoining lot owners if there be no injury done to their property. In other words, an adjoining lot owner on a street has no such property interest in the street as entitles him to compensation for a change in the grade of the street by the city. As said in *City Council of Montgomery v. Townsend*, 84 Ala. 478, 4 South. 780, it is "both the privilege and duty of a city government to so grade the streets or change their grade as to make them safe and convenient, and this power is conclusively presumed to have been conferred when the dedication was made." But in the exercise of this privilege and duty, if the property of an abutting owner is or will be injured thereby, clearly under our constitutional provision and adjudged cases he may restrain the further prosecution of the improvement of the street by the city until just compensation is paid to him for the injury done or about to be done to his abutting property.

It may be that the eleventh paragraph of the bill is susceptible of the construction that complainant bases his relief to some extent upon his supposed property right in the avenue, but it is also clearly susceptible of the construction that his right is predicated upon his property interest in his storehouse and lot (and not in ⁸⁷⁶ the avenue), which the bill distinctly shows will be substantially injured should the improvement by the city of grading the avenue be permitted to progress. There is no ground of demurrer specifically raising this point, and clearly the motion to dismiss cannot avail as against an amendable defect, which this is.

It is true the opinion does not exclude complainant's right to relief on account of his supposed property rights in the avenue. And its failure to do this, coupled with certain expressions contained in it, is calculated to lead to the conclusion that such a right exists. But this misleading tendency is overcome, I think, when we consider its entire context. My concurrence in the conclusion reached on this point, I wish to be understood, was upon the proposition that the equity of the bill is based upon complainant's right to compensation for the injury done his property abutting on the avenue, and not upon an injury to his supposed property interest in the avenue itself.

The other questions raised on the record are sufficiently clearly dealt with, so there is no need of discussing them further.

Where a Change in the Grade of a City Street is being made in pursuance of valid legislative and municipal authority, a citizen, whether or not his land abuts on the street, whose property is not taken, but merely subjected to consequential damages, cannot have the work enjoined until his damages are ascertained and paid, under a constitutional provision that private property shall not be taken or damaged for public use without just compensation: Clemens v. Connecticut Mut. Life Ins. Co., 184 Mo. 46, 105 Am. St. Rep. 526. But though a court of equity will not entertain jurisdiction at the suit of a person whose property is not actually taken, to enjoin the making of a public improvement, yet, if the threatened act involves an actual taking, expropriation will be enjoined until the damages are ascertained and paid: Elser v. Gross Point, 223 Ill. 230, 114 Am. St. Rep. 326.

SLOSS-SHEFFIELD STEEL AND IRON COMPANY v. JOHNSON.

[147 Ala. 384, 41 South. 907.]

NUISANCE, PUBLIC—Injury to His Property Which will Sustain Suit by a Private Person.—If a property owner sustains an individual or specific damage in addition to that suffered by the public, he may sue to have a public nuisance abated, for his remedy at law is inadequate. (p. 90.)

NUISANCE, PUBLIC.—The Special Damages Entitling a Property Owner to an Injunction Against a Public Nuisance must be different in kind and not merely in degree from that suffered by the general public. (p. 90.)

NUISANCE, PUBLIC, Special Damage or Injury, What Amounts to.—A public nuisance which forces the owner of land out of his direct public street or road into a circuitous route, in his commerce and intercourse with the outside world, is a peculiar and special injury to him not suffered by the general inhabitants of the city, county or state, and entitles him to maintain a suit to abate it. (p. 91.)

INJUNCTION Against a Public Nuisance, Remedy at Law, When not Adequate.—A property owner whose access to his property is obstructed by a nuisance on a public street requiring him to take a circuitous route to reach such property has not an adequate remedy at law, and is therefore entitled to relief in equity. (pp. 91, 92.)

Suit to abate a nuisance arising from the obstruction of streets in the city of Birmingham by dropping slag therein.

Tillman, Grubb, Bradley & Morrow, for the appellants.

Cabaniss & Weakley, for the appellee.

288 **TYSON, J.** This is the case of a bill filed by the appellee to abate a public and private nuisance arising from obstructing streets in the city of Birmingham by dumping therein slag from a furnace. The appellant demurred to the bill, and, the demurrer being overruled, this appeal is prosecuted to reverse the decree of the lower court.

288 The complainant is the owner of a block of city property, which, it seems, is east of the alleged obstructions placed in the streets by the appellant; and the allegation making out the public nuisance is that the streets are, and long have been, dedicated to public uses as highways, and that the appellant, by dumping slag therein, totally obstructs the use thereof. The allegation, to give the appellee a standing in court to have this public nuisance abated, is that he is the owner of the property, an entire square, in the vicinity, and that the

obstructed highways are streets leading from his property to the city of Birmingham and are the direct way for travel, and that by the obstructions he is deprived of the use of this direct route, and is compelled to take a circuitous one into other streets to the north or south of the obstructions. It is conceded that the facts alleged make out a public nuisance, and the only point at issue is whether they show such a peculiar injury to the complainant below as to give him a standing in court.

The general rule is that a private individual, who suffers no damage different from that sustained by the public at large, has no standing in court for the abatement of a public nuisance; but if he sustains an individual or specific damage in addition to that suffered by the public, he may sue to have the same abated if the remedy at law is inadequate: *Rosser v. Randolph*, 7 Port. 238, 31 Am. Dec. 712; *Columbus & W. Ry. Co. v. Whiterow*, 82 Ala. 190, 3 South. 23; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 9 L. ed. 1012; 3 Notes U. S. Rep. 710; *Pennsylvania v. Wheeling & Belmont B. Co.*, 13 How. (U. S.) 518, 14 L. ed. 249; *In re Debs*, 158 U. S. 587, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092; *Jones v. Bright*, 140 Ala. 268, 37 South. 79. This proposition is not denied, but it is insisted that no special damage is shown in this case to the complainant below, and that if such damage is shown the remedy at law is adequate in a suit for damages. As to special damages, the rule is that the injury, to be special, must be one different in kind, and not mere degree, from that suffered by the general public from the act complained of: *Bigley v. Nunan*, 53 Cal. 403; *Crowley* ³⁸⁷ *v. Davis*, 63 Cal. 460; *Decker v. Evansville etc. R. R. Co.*, 133 Ind. 493, 33 N. E. 349; *Gundlach v. Hamm*, 62 Minn. 42, 64 N. W. 50; *High on Injunctions*, sec. 589.

The situation shown by the bill is that the nuisance is the obstruction of the two streets bounding the complainant's block of land on the north and south, and extending directly into the city of Birmingham; the obstruction being two blocks distant in a westerly direction from complainant's property, and compelling all travel between his property and the city to take a circuitous route north or south of the two obstructed streets into other streets leading into the city, instead of pursuing the direct course along Second and Third avenues, which are the obstructed streets. So the question is whether forcing the owner of land out of his direct public street or road into

a circuitous route in his commerce and intercourse with the outside world is a peculiar or special injury to him, not suffered by the general inhabitants of the state, county or city: *Spencer v. London & Birmingham Co.*, 8 Sim. 198. The statement of the proposition seems to give the affirmative answer to the inquiry. If the direct and usual route of travel may be obstructed, there could certainly be no reason why the indirect routes might not also be closed one by one, until the unlawful and criminal invasion of public roads put the unfortunate owner's property in a cul-de-sac, compelling a day's time instead of a few moments of time, in going to business, church or market. An individual might be entirely inclosed, and the value of his property destroyed, without affecting the public. The injury is thus clearly individual and special. In the case of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (U. S.) 518, 14 L. ed. 249, the state of Pennsylvania entirely as an individual filed its bill to abate the obstruction by a bridge of a public waterway in the state of Virginia which interfered with the general commerce and travel feeding its connecting railroads and canals; and after elaborate consideration, relief was granted on the ground that the bridge, though a public, was also a private, nuisance, on account of the special injury to the complainant. There can be no question that the obstruction of a route of communication ~~and~~ with the public community enjoyed by a property owner is a private or special injury, although it may be at the same time a public nuisance, entitling the injured party to appeal to a court of chancery for protection if the injury is substantial, and the remedy at law is not adequate: 13 How. (U. S.) 567, 14 L. ed. 269; *Jones v. Bright*, 140 Ala. 268, 37 South. 79.

The only question, then, is whether or not the obstruction of the streets in this case could be fully and adequately remedied by an action at law for damages. This question seems to be precisely decided in the case of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 562, 14 L. ed. 267, where the court, speaking of the obstruction of a public waterway changing the line of transportation over the complainant's railroad and canals, says: "This injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily, prosecutions for the wrong done; and from the nature of that wrong the compensation could not be measured or

ascertained with any degree of precision. The effect (of the injury) would be, if not to reduce the tolls on these lines of transportation, to prevent their intercourse with the increasing business of the country." The obstruction of the streets in this instance is continuing, but may be temporary or permanent, and the injury to the complainant, whether embracing the present or prospective injury to his property, is entirely incapable of any precise measurement. These obstructions might direct the line of city development away from the plaintiff's property. There is thus no full, adequate and complete remedy open to the plaintiff for his individual injury, save in this court: *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56, 34 South. 624; *Cabbell v. Williams*, 127 Ala. 320, 28 South. 405; *Whaley v. Wilson*, 112 Ala. 627, 20 South. 922; *Jones v. Bright*, 140 Ala. 268, 37 South. 79; *Georgetown v. Alexandria Co.*, 12 Pet. (U. S.) 98, 9 L. ed. 1012; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (U. S.) 567, 14 L. ed. 269; *Stetson v. Faron*, 19 Pick. 147, 31 Am. Dec. 123, and note; *Sampson v. Smith*, 8 Sim. 272; *Spencer v. London & B. Co.*, 8 Sim. 193.

³⁸⁹ There was no error in the decree of the lower court, and therefore it is affirmed.

All of the justices concur, except Weakley, C. J., not sitting.

To Entitle an Individual to Maintain an Action for damages resulting from the obstruction of a public highway, or a suit in equity to prevent such obstruction, he must have sustained damages differing not merely in degree, but in kind, from the damages sustained by the general public. But he sustains such damages by the vacation or obstruction of a street on which his property abuts, although the obstruction or vacation is not in the block where his property is situated: *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007, and see the cases cited in the cross-reference note thereto. An individual may maintain an action against one who constructs a building across the street some two hundred feet from his residence, and between it and the business part of the city: *O'Brien v. Central Iron etc. Co.*, 158 Ind. 218, 92 Am. St. Rep. 305.

LEA v. IRON BELT MERCANTILE COMPANY.

[147 Ala. 421, 42 South. 415.]

CORPORATION, Notice to Creditors of, that Stock was Issued for Property Taken at an Overvaluation.—Though property has been received at an overvaluation in payment of a subscription to the stock of a corporation, its creditors who take such stock with knowledge of the overvaluation and payment thereby cannot assail the transaction. (p. 96.)

PRINCIPAL AND AGENT.—Knowledge of the Agent will not be Imputed to His Principal when it is such as it is the agent's duty not to disclose it, nor when it is certain from his relation to the subject matter or his previous conduct that he will not disclose it, nor when the person claiming the benefit of the knowledge or notice or those whom he represents collude with the agent to cheat or defraud the principal. (p. 100.)

CORPORATION, Knowledge of Chief Stockholder and Manager, When must be Imputed to It.—If one who is the manager and chief stockholder in a corporation and constitutes its alter ego has knowledge of the fact that stock has been issued in another corporation for property received at an overvaluation, though such knowledge was acquired by him while not acting as agent of his corporation, such knowledge must be imputed to it, and precludes it as a creditor of the other corporation from maintaining a suit to assail the transaction by which the stock of the latter corporation was issued, and compelling its stockholders to make additional payments on their subscriptions. (p. 101.)

APPEAL AND ERROR—Service of Process Against Corporation not Appearing to be on Authorized Person.—If it appears that there is a decree pro confesso, but it does not appear that the person on whom the service was made was a person on whom process could be served, the decree is erroneous. (p. 101.)

J. J. Willett, for the appellant.

Blackwell & Agee and Cabaniss & Bowie, for the appellee.

423 TYSON, J. The bill in this case was filed by a judgment creditor of the Piedmont Land and Improvement Company, an insolvent corporation, after execution with a return of "No property found," seeking to condemn an alleged unpaid subscription to capital stock of said corporation made by respondent Lea. When this cause was here on former appeal, the equity of the bill was sustained, not upon the theory that complainant's right to condemn the unpaid subscription was on account of any privity of contract existing between it and the subscriber Lea, or that the statute under which the debtor corporation was organized created a liability which the complainant would have the right to enforce, but solely upon the ground of fraud, in that the complainant, on

the facts averred, "would be justified in presuming that the law requiring the subscription to stock to be paid in money or in property at its reasonable value had been strictly complied with": *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271, 24 South. 28. In *Elyton Land Co. v. Birmingham Warehouse Co.*, 92 Ala. 407, 25 Am. St. Rep. 65, 9 South. 129, 12 L. R. A. 307, the bill was by a judgment creditor, as here, seeking to subject an unpaid subscription, on the ground that the property was knowingly accepted by the corporation, in discharge ⁴²⁴ of the subscription obligation, at a valuation grossly in excess of its true value. The court, after an exhaustive examination of the authorities and a careful review of the constitutional and statutory provisions bearing upon the subject of the organization of corporations, held that while the acceptance of the property may bind the corporation, it was not binding on creditors, without notice of the mode in which the stock subscription was undertaken to be paid, because it was a fraud upon them, in that "the capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right to assume that the stock has been actually paid in or that it may be reached."

The case now being before us on its merits, the first question to be determined is whether the allegations of the bill charging fraud in the discharge of the subscription obligation by the conveyance of property at an overvaluation are satisfactorily shown by the evidence. It appears that a number of persons, owning or controlling a tract of land costing them about \$100,000, organized the Piedmont Land and Improvement Company for the purpose of selling the lands as town lots, and subscribed for \$1,250,000 of stock, paying the same, under their contract of subscription, by conveyance of the tract of land, comprising some two thousand two hundred acres. Respondent Lea's subscription was \$118,750, which was paid by his pro rata share of the land. The capital stock of the company, to the extent of \$250,000, was donated to the company, thus reducing the price at which the land was valued to \$1,000,000. The company was organized in January, 1890, took possession of the property, and sold in a few weeks about two hundred acres of this land for about \$350,000, and the same land shortly afterward was worth in the market and sold for as much as \$700,000. These events occurred during the excitement of the speculative period, in

full force at the time of the organization of the company and for some time afterward. When the collapse came, it was realized that values were based on illusions, and this company, with many others, became insolvent. The fact that this was not an isolated case of adventure, but an example of the ⁴²⁵ general excitement of the country at that time, and that the expectations of the organizers of this company seemed on the point of full realization, go very far to show that its organization was in entire good faith and without the least purpose to defraud. And so we must take it that the original subscribers for stock intended merely to take advantage of the opportunity and sell through the instrumentality of the corporation their body of land. Still we cannot resist the conclusion, and so hold, that the land conveyed was not at that time of the money value at which it was estimated, and that the corporators must have known that fact, however much they may have believed it would advance in the future.

Having reached this conclusion, we shall now consider the defenses. The respondent Lea, in his answer, after denying the overvaluation of the land conveyed to the company in payment of his stock subscription, asserts that the complainant had notice that his stock subscription had been discharged to the corporation in the manner shown to have been done, and it is insisted that to compel a subscriber to pay otherwise than as he agreed to pay for his stock to a party who knew, before extending credit, how the subscription had been discharged, would be an injustice. The question presented for our determination, in view of the fact that there was an overvaluation, is whether the fact of knowledge by complainant of the overvaluation, if true, is a good defense, and whether this defense is supported by the evidence. The complainant was organized in 1891, and made the loan, the basis of the judgment sought to be enforced, in 1894 or 1895. It therefore became a creditor of the debtor corporation after that corporation had accepted the lands in discharge of the subscription obligations at the overvaluation complained of. It cannot be doubted that if complainant had notice of the actual state of affairs, being a subsequent creditor, it cannot disturb the arrangement between the company and its stockholders. It is impossible, with notice of the character and value of the land, for complainant to have acted on and trusted appearances, rather than the true condition of affairs, ⁴²⁶ and, therefore, to have been deceived. This seems to be the uni-

versal doctrine of the courts. This principle, as well as the one upon which the equity of the bill must rest, are ably discussed by Messrs. Clark & Marshall in their work on Private Corporations, at page 2327. These authors, after showing that assets of a corporation are not a trust fund for creditors in any proper sense, say: "It has been repeatedly held, in the absence of special statutory provisions, that where a corporation issues stock as bonus, or for less than its par value in cash, or for property taken for an overvaluation, the transaction cannot be assailed, and full payment by the stockholders required, by or for the benefit of persons who became creditors before the stock was so issued or who participated in the transaction, or who afterward dealt with the corporation and became creditors with knowledge, for in neither of these cases is there any fraud as against them." "It is difficult, if not impossible," said the Minnesota supreme court, "to explain or reconcile these cases upon the trust-fund doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which the stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have the right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating⁴²⁷ the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of bonus stock. This furnishes a rational and uniform rule, to which

familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the trust-fund doctrine has involved it; and we think that even where the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule": See, also, 2 Morawetz on Corporations, sec. 829; Cook on Stock and Stockholders, 2d ed., sec. 44; First Nat. Bank v. Gustin M. Cor. Min. Co., 42 Minn. 327, 18 Am. St. Rep. 510, 44 N. W. 198, 6 L. R. A. 676; Hospes v. Northwestern M. & C. Co., 48 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. 1117, 15 L. R. A. 470; Coit v. North Carolina Am. Co. (C. C.), 14 Fed. 12, 119 U. S. 343, 7 Sup. Ct. Rep. 231, 30 L. ed. 420; Ft. Madison Bank v. Alden, 129 U. S. 372, 9 Sup. Ct. Rep. 332, 32 L. ed. 725; note to Clark v. Bever (C. C.), 31 Fed. 670; and other authorities cited on this point on brief of counsel for appellant. This principle does not seem to be controverted, but is sought to be avoided only by a denial of the fact of notice.

The evidence shows that R. J. Riddle organized the complaining corporation, the creditor, and was its president and general manager, and that he constituted the company in all its outside relations with the world. It was by and through him that complainant made the loan sought to be recovered in this suit. The evidence further establishes to our entire satisfaction that Riddle was intimately acquainted with the details of the organization and affairs of the Piedmont Land and Improvement Company. He was "one of the boomers of the town of Piedmont," which was built on the lands subscribed. He was the confidential selling agent of the company, and received in compensation nearly \$8,000 for negotiating sales of this identical land. He applied to the promoters of the ⁴²⁵ scheme to be permitted to participate in the purchase of the lands which were conveyed to the company in discharge of the stock subscriptions. He complained that he had not been let in "on the ground floor" as a stockholder in the company. This he would hardly have done without knowing what was on "the ground floor." It can scarcely be doubted, under the evidence, that Riddle knew that the subscription of Lea had been paid with his interest in the land, that the capital stock of the company consisted of land, and that the subscribers for stock did not contemplate further payments on their subscriptions for stock. Nor can it be seriously

doubted that Riddle knew, at the time that the debtor company was organized, the value of the land conveyed to it by the stockholders in discharge of their subscription, as well as the amount of the capital stock of the company. If Riddle individually had become the creditor, instead of his corporation, whose affairs he seems to have managed to suit his own pleasure and for his personal benefit, there is no doubt that he could not complain of having been deceived or defrauded. It is in effect conceded that Riddle did have the fullest notice; but it is insisted that his knowledge was not acquired in the course of his agency for or management of the complainant corporation, and, therefore, his knowledge cannot affect the rights of that company. Conceding the soundness of the insistence in a proper case, it is but a rule of evidence, and has its limitations. Under the facts of this case, the rule has no application, and, therefore, can exert no influence in its decision. Here Riddle was personally interested and concerned in the agreement by which the debt now sought to be collected originated. Besides, he was the sole manager and controller of the creditor company at his will—its alter ego—and, it seems, was its sole stockholder but one, the other being a nonresident. Indeed, it is difficult to consider him as other than the creditor corporation itself, so completely were the affairs of it subject to his will and under his immediate control. But in this particular transaction he acted both for himself and for his company. The result of that transaction was the acquisition ⁴²⁹ by him personally of \$30,000 of bank stock and the note for his company evidencing the loan, and of some \$90,000 of collateral. All of this he and his company acquired as part of the consideration for making the loan, constituting the debt which his corporation is now attempting to collect by this proceeding. So, then, we must look upon Riddle in two capacities—one as an individual, and the other as manager of his company. Riddle, as an individual, and Riddle, as manager, are found entering into a joint transaction for their joint benefit with the agent of the Piedmont Land and Improvement Company, with full legal knowledge of the details of the organization of that company. In short, he as an individual and as manager co-operated in doing an act for their joint interest. As to this particular act or transaction they became as one person, and the knowledge of the one must be imputed to the other. For Riddle as an individual and Riddle as general manager of his corpora-

tion could not do a single act for their mutual benefit from different standpoints. It would be a psychological impossibility for him to have had a different consciousness respecting the affairs of the debtor corporation, as general manager of his company, from what he had individually; and so we hold that as general manager he had the same familiarity with the affairs of the debtor company that he undoubtedly possessed individually: *Anderson v. Kinley*, 90 Iowa, 554, 58 N. W. 909; *Huron Printing & B. Co. v. Kittleson*, 4 S. Dak. 520, 57 N. W. 233.

It may be well, however, before concluding, to notice the contention of appellee on this point. The insistence is that as Riddle was an agent of his corporation, and acquired the knowledge which we have imputed to his principal antecedent to its organization, the rule applies "that notice to an agent, to bind his principal, must have been acquired by the agent during his employment—i. e., while he is actually employed in the prosecution of his duties as agent—and not at a time antecedent to the period of his agency": *Goodbar v. Daniel*, 88 Ala. 583, 16 Am. St. Rep. 76, 7 South. 254, and cases there cited. But this principle, as we have said, has no application⁴²⁰ to the facts of the case. In all cases where it has been enforced and applied by this court as a rule of evidence, the relation simply of principal and agent existed between the parties. In none of them was the party possessing the knowledge sought to be imputed to the principal anything more than a mere agent. He was not the alter ego of the corporation, as here, and had not the absolute dominion over its affairs, as Riddle is shown to have had. In none of them would the pecuniary interest of the agent have directly affected as in the case of Riddle. Suppose Riddle had acquired the knowledge while manager of his company, in a transaction for it prior to the one here involved, and desired to communicate it to his corporation, to whom would he have communicated it? He was, as we have said, to all intents and purposes the corporation itself. It could be nothing but the sheerest nonsense to say that as agent he should communicate the knowledge to himself as the managing representative of his corporation. Since the corporation could acquire notice in no other way than by and through its managing head or officer, it will scarcely be doubted that notice to such officer is of necessity notice to it.

But this court has not in all cases applied the rule here invoked by the appellee. To the contrary, in a number of them the knowledge of the agent, though acquired in an antecedent proceeding or transaction, although the principal was a complete stranger to that prior proceeding or transaction, was imputed to the principal, and he was charged with the knowledge of his agent. The following are some of these cases: *White v. King*, 53 Ala. 162; *Dunklin v. Harvey*, 56 Ala. 177; *Wiley v. Knight*, 27 Ala. 336; *City Nat. Bank v. Jeffries*, 73 Ala. 183. We have but to read the facts of these cases to see that this is true. So, then, the rule invoked and relied on by appellee has not been uniformly applied by this court, and while the cases last cited make no reference to it, or the cases in which it was applied, there is really no conflict between the two lines of cases. The cases last cited by us must be regarded as being controlled by the limitation put upon the general rule which was applied ⁴³¹ in those relied on by appellee. That the application of the general rule as laid down in *Goodbar v. Daniel*, 88 Ala. 583, 16 Am. St. Rep. 76, 7 South. 254, is subject to an important and well-settled limitation, does not admit of serious controversy. It is this: "Where the transaction in question clearly follows and is intimately connected with a prior transaction, in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite (general rule) becomes inapplicable. The notice given to or information acquired by the agent in the former transaction operates as constructive notice to the principal in the second transaction, although that principal was a complete stranger to, and wholly unconnected with, the proceeding or business": 2 *Pomeroy's Equity Jurisprudence*, 3d ed., sec. 672, and notes; *Mechem on Agency*, sec. 721. And this principle is fully applicable to corporations: *Mechem on Agency*, sec. 670, note 2, and cases there cited. See, specially, *Willard v. Denise*, 50 N. J. Eq. 422, 35 Am. St. Rep. 788, and note, 26 Atl. 29.

We are not to be understood that this limitation is without its exceptions. The notice or knowledge of the agent will never be imputed to his principal (1) "when it is such as it is the agent's duty not to disclose; (2) when the agent's rela-

tions to the subject matter or his previous conduct renders it certain that he will not disclose it; and (3) when the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal": Mechem on Agency, *supra*. So, then, if it be conceded that the point under consideration is controlled by the rules governing principal and agent, it may be held, in harmony with our own cases, under the limitation declared by Mr. Pomeroy and Mr. Mechem in their excellent works, that Riddle's knowledge is imputable to his corporation. It would, therefore, necessarily follow that, complainant being chargeable, at the time of the creation ⁴³² of its debt, with notice of the overvaluation of the land accepted by the debtor corporation in discharge of the stock subscription, it cannot maintain this bill to charge respondent Lea on his subscription. This renders it unnecessary to consider the other assignments of error by appellant Lea.

In reference to the error assigned by the Piedmont Land and Improvement Company, it appears that there is a decree *pro confesso*, but the decree does not show that the person upon whom the service was had was a person on whom service could be made. That decree is, therefore, erroneous: *Independent Pub. Co. v. American P. Assn.*, 102 Ala. 475, 15 South. 947.

The decrees of the lower court are reversed, and a decree will be here rendered dismissing the bill.

Weakley, C. J., and Simpson and Anderson, JJ., concur.

Where Corporate Stock Subscriptions are made payable in property, it must be taken at a reasonable money value; and although a margin will be allowed for honest differences of opinion as to such value, deliberate and intentional overvaluation is not permissible. When overvaluation is excessive and intentionally made, though without actual fraud, it is invalid as to corporation creditors, who may proceed against stockholders individually as for unpaid subscriptions: *Macbeth v. Banfield*, 45 Or. 553, 106 Am. St. Rep. 670.

CENTRAL IRON AND COAL COMPANY v. VANDEN-HEUK.

[147 Ala. 546, 41 South. 145.]

INJUNCTION Against Blasting.—A property owner is entitled to an injunction against the continuance of blasting, by which rocks are constantly thrown on his land, though he cannot show that the blasting has been negligently done. (pp. 102, 103.)

Bill to abate a nuisance consisting of the constant throwing of rocks and other debris upon the house and land of the complainant by blasting.

Henry A. Jones, for the appellant.

Vaughn & Davidson and Smith & Smith, for the appellee.

⁵⁴⁷ **ANDERSON, J.** It is an elementary principle in reference to private rights that every individual is entitled to the undisturbed possession and enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others; otherwise, it might be made destructive to their rights altogether. In the case of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, where the declaration charged that by the defendant and its agents and servants, while constructing a canal on their own premises, which they had the right and authority to do, large quantities of gravel, slate and stone were thrown upon plaintiff's lands, the court said: ⁵⁴⁸ "The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher rights of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motive of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful business": *Alfred's Case*, 9 Coke, 58. "He may excavate a canal, but he cannot cast the dirt and stone upon the lands of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages arising therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." And it would seem that one who makes a

blast on his own land, and thereby causes rock to fall upon the lands of another, or upon one on the highway, is liable as a trespasser for injuries inflicted, although the blast is fired for a lawful purpose and without negligence or want of skill: *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 16 L. R. A. 443.

It is true that the bill avers that the rocks were thrown on complainant's premises because of the negligent manner of blasting, and the undisputed evidence of respondents is that there was no negligent blasting; yet the bill avers that the rocks were constantly thrown on complainant's premises, and this fact was proven by his witnesses, and was contradicted only by circumstances and inferences. The complainant, consequently, made out a case for equitable relief, although he fails to prove that the blasting was negligently done, which was merely cumulative, and the nonexistence of which could not defeat the bill: *Noble's Admr. v. Moses*, 81 Ala. 530, 60 Am. Rep. 175, 1 South. 217. While a complaining party cannot use a court of equity for the purpose of avoiding an action at law, which would afford ⁵⁴⁹ redress, and which would doubtless give sufficient relief in a case of trespass to realty, and which involved no consideration for equitable interference, yet, if the wrong is of such a character that it makes out a case for which an action at law affords no adequate relief, a court of equity will prevent the wrong by injunction: *Wilson v. Meyer*, 144 Ala. 402, 39 South. 317. "The chief forms in which inadequacy of the common law—the fundamental basis of all equity jurisdiction over torts—manifests itself are cases of irreparable injury, and cases of continuous or repeated nuisances involving a multiplicity of suits at law": 5 Pomeroy's Equity, 514. In the case of *Rogers v. Hanfield*, 14 Daly (N. Y.), 339, it was held that an injunction was proper to prevent a party, while blasting, from hurling large quantities of loose rock upon the premises of the complainant, notwithstanding he was doing so under instructions of a city ordinance: See, also, on this subject, *Hill v. Schneider* (Sup.), 43 N. Y. Supp. 1; Pomeroy's Equity Jurisprudence, 1357.

According to the averments of the bill and the proof, the wrongs are of a continuous character, constantly interfering with the enjoyment by the complainant and his family of his premises, and which do not fall short of a nuisance, and

for which the complainant cannot obtain adequate redress in a court of law. The fact that none of the occupants have thus far been hurt may weaken to some extent the complainant's proof, but it does not deprive the bill of equity. The law does not consider that a man has the free enjoyment of his home, when large rocks are frequently hurled upon his house-top, in his yard, and upon his highway, simply because he has thus far escaped physical hurt. Nor does it help matters that the respondents give a warning signal before every blast, as the law does not require that it is incumbent upon a man to have to seek shelter for himself and family from a wrongful bombardment of his premises, although the aggressive party gives timely notice before committing the dangerous act. It must be also observed that if the defendants' theory is correct as to the manner of operating its quarry, and that the rock would ⁵⁵⁰ not be hurled beyond its own land, then it cannot sustain any hurt or hindrance in the prosecution of its business by the decree of the chancellor, as the injunction does not restrain it from blasting, but simply from doing so in such a way as to molest the complainant.

The decree of the chancellor is affirmed.

Weakley, C. J., and Haralson, Tyson, Simpson and Denson, JJ., concur.

Blasting Operations, although necessary and done without negligence, may give an adjoining land owner a cause of action: *Gossett v. Southern Ry. Co.*, 115 Tenn. 376, 112 Am. St. Rep. 846; *Longtin v. Persell*, 30 Mont. 306, 104 Am. St. Rep. 723.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

WESTERN UNION TELEGRAPH COMPANY v. HOLLINGSWORTH.

[83 Ark. 39, 102 S. W. 681.]

TELEGRAPH COMPANIES.—Under the Mental Anguish statute of Arkansas a recovery may be had against a telegraph company for the negligent failure to deliver a telegram relieving mental anguish or suffering. (pp. 106, 109.)

George H. Fearons and Rose, Hemingway, Cantrell & Loughborough, for the appellant.

J. G. Williamson and D. A. Bradham, for the appellee.

30 HILL, C. J. Appellee E. A. Hollingsworth was a minister, and lived at Camden, and his brother, Hugh, at Bearden. These towns are close together, but are not directly connected by railroad. A hack line ran between them. Mr. E. A. Hollingsworth was an older man than Hugh Hollingsworth, and had partially raised him, and was tenderly attached to him. Hugh Hollingsworth was a man of delicate health.

On Sunday, the 5th, E. A. Hollingsworth received a letter stating that Hugh was sick with pneumonia, and the letter had in it this statement: "Tuesday will be the ninth day, and you know what that means." On Tuesday at 8:30 A. M. he received 40 a telegram to the effect that his brother was at the point of death and wanted him to come at once. Owing to the inclemency of the weather and the creeks being up, he was advised not to make the trip, and did not go. On the 8th he tried to reach Bearden over the telephone, but was unable to get connection. He then sent a telegram to a friend

inquiring of his brother's condition, as follows: "How is Hugh; if dead, when and where buried." He explained to the agent who received the telegram the condition of affairs. Mr. Reem, to whom this telegram was addressed, received it and sent a reply saying, "Hugh is better to-night." This was about 8:30 P. M. on Wednesday the 8th. The agent forgot to send this telegram, which seems to have been overlooked until a second telegram from Mr. Hollingsworth inquiring the condition of his brother brought forth this forgotten answer, and it was delivered about 6 o'clock on the evening of the 9th, a delay of almost twenty-four hours. During this time Mr. Hollingsworth had suffered great anxiety of mind and had spent a sleepless night. His anxiety would have been relieved if he had received the telegram. He brought suit against the Western Union, and recovered judgment for two hundred and fifty dollars. The telegraph company has appealed.

⁴¹ The principal question in this case is whether there can be a recovery under the mental anguish statute, section 7947 of Kirby's Digest, for the negligent failure to deliver a telegram relieving mental anguish or suffering.

As is well known, the mental anguish doctrine originated in Texas, and this court refused to follow it; and subsequently the legislature enacted the statute in question, making mental anguish or suffering an element of damages in actions for negligence in receiving, transmitting or delivering messages. Naturally, the court will go to Texas and other states which have adopted the mental anguish doctrine in order to determine its full force and effect. But it cannot be said that the legislature intended by this statute to adopt the mental anguish doctrine of any one state, for it prevails in many, and there are many differences in the application of said doctrine by the courts in the states in which it prevails, and inconsistencies in its application, even in the same state. It is necessary, therefore, for the court to give the statute a reasonable construction, attempting to carry out the design of the legislature in putting in force an element of damage for mental anguish and suffering for negligence in receiving, transmitting or delivering messages, and not be bound by the vagaries and inconsistencies which prevail in jurisdictions where it obtains by judicial construction.

This exact question came before the supreme court of Texas, in *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, 12 S. W.

534, and the court said: "The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be ⁴² held an element of the damages resulting from the breach. For injury to the feelings in such cases the courts cannot give redress. Any other rule would result in intolerable litigation."

This case has been expressly followed in North Carolina, another state in which the mental anguish doctrine has prevailed by judicial construction: See *Sparkman v. Western Union Tel. Co.*, 130 N. C. 447, 41 S. E. 881.

Other cases are cited in the brief of appellant where this distinction is recognized, but all of them seem to rest upon the *Rowell* case (75 Tex. 26, 12 S. W. 534). The courts which do not follow the *Rowell* case disapprove the distinction made in it. For instance, in Kentucky, where this doctrine prevails, it was held that the mental anguish of a father in beholding the sufferings of his child during the period that a telegraph company negligently delayed delivering a message to a physician announcing the nature of the child's trouble, and requesting his immediate presence with surgical instruments, is not a proper element of recovery against the telegraph company, although Texas and Alabama had held that there could be recovery for failure to deliver such a telegram. The Kentucky court said: "The Texas cases do not seem to us reconcilable": *Western Union Tel. Co. v. Reid*, 120 Ky. 231, 85 S. W. 1171, 70 L. R. A. 289.

The Minnesota court, in commenting upon the *Rowell* case, said: "The court (referring to the Texas court), apparently impatient at the amount of 'intolerable litigation' to which the doctrine had given rise, seems to have gone back, partially at least, upon their former decisions": *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078, 25 L. R. A. 406.

The Virginia court, in its opinion refusing to adopt the mental anguish doctrine, reviewed the authorities upon the subject carefully, and, referring to the distinction drawn in the *Rowell* case, said: "We fail to appreciate the distinction the court seeks to draw in that case, and it has been suggested in later decisions of the courts of other states that it was evidently resorted to for the purpose of staying the tide

of 'intolerable litigation' flowing from the decisions following the *So Relle* cases': *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 93 Am. St. Rep. 919, 40 S. E. 618, 56 L. R. A. 663.

In *Western Union Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152, 70 S. W. 43 229, decided by the court of civil appeals in Texas, to review the judgment of which the supreme court denied a writ of error, the doctrine of the *Rowell* case is distinguished until little is left of it, if it is not overruled. This case would not have the weight that it does if it were not that the supreme court has impliedly affirmed it by refusing a writ of error to review it. The question was the same as in the *Kentucky* case, and it was held that the father could recover damages for increased mental anguish incurred from witnessing the suffering of his sick child, where such increased suffering is occasioned by the negligent failure of a telegraph company to promptly deliver a message addressed by the father to a physician directing him to come to the sick child at once. The court said: "It may seem difficult to reconcile in principle the cases cited with *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, 12 S. W. 534 (and several others), but the distinction seems to be that in the case first cited the increased mental anguish was proximately caused by the negligent failure of the company to perform its contract, and that in the last-named cases the prolonged mental anguish was too remote from such negligence to constitute a basis for damages. If this be not the distinction, none exists, and the opinions are in irreconcilable conflict."

The difficulty of reconciling the Texas cases is pointed out in 1 Sutherland on Damages, third edition, section 975, where these cases are reviewed.

The court is unable to discover the distinction that is attempted to be made in the Texas and North Carolina cases. And as the distinction in the Texas cases seems to have originated to stay the tide of the "intolerable litigation" that arose from an unwise earlier decision of the same court, it is not necessary to look further for the logic of it. The legislature has put in force mental anguish and suffering as elements of damage, and the court must take the construction which common sense and experience teaches should be given to the terms describing such elements of damage. That anyone would suffer as keen and real mental anguish for failing to hear from the sick-bed of a dangerously ill member of the family is too apparent to need any explanation; and no re-

finement or distinction can take away the reality of such suffering. There is the danger that ⁴⁴ there may be a recovery for mental anguish which arises from purely imaginary causes, but that is not the case here, and it seems to be settled that there can be no recovery where the anxiety is imaginary: 1 Sutherland on Damages, 3d ed., sec. 975.

But there is no greater danger of wandering into imaginary realms from a telegram such as this than in those announcing illness. The court fails to see a distinction between mental anguish in failing to give an opportunity to be with the sick or dying and failing to relieve the distress in not hearing from the sick or dying.

Other questions are presented and discussed in this case; but all of them have recently been held against the appellant in decisions where similar questions arose, and it is not necessary to discuss them again.

Judgment is affirmed.

Mr. Justice Riddick dissents.

The Right to Recover Damages for Mental Anguish due to the negligence of a telegraph company in delaying the transmission of a message is discussed in the recent note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 305.

STATE v. BROWN.

[83 Ark. 44, 102 S. W. 394.]

LIQUOR—What Amounts to Sale without License.—Where A, after refusing to sell, but offering to loan, whisky to B, delivers two bottles to him, and an hour or two later B returns and hands A the amount which the liquor cost, directing A when he makes another order for whisky to get B some and keep it in place of what B has obtained, the transaction amounts to a sale. (p. 111.)

W. F. Kirby, attorney general, and Daniel Taylor, assistant, for the appellant.

H. Coleman, for the appellee.

⁴⁵ HILL, C. J. Harry Brown was indicted in Arkansas county for selling liquor without license to one McNeeley. Both state and defendant rested upon the testimony of McNeeley, which was in substance as follows: He went to a livery-stable in which Brown was employed as a hostler, and saw Brown with two bottles of whisky in his pocket. He asked

Brown to sell him some whisky, and Brown replied he could not, but that he would loan him some, and he told Brown to let him have one or two bottles. Brown then let him have the two bottles. Nothing was said as to when it should be returned or paid for. About an hour and a half later he returned to the stable and asked what it cost to get whisky there, and Brown replied sixty cents a pint, and McNeeley gave him (Brown) one dollar and twenty cents, and told him when he made another order to get him (McNeeley) some and keep that in place of what he had got.

This was the whole transaction, and the court sent the case to the jury as to whether the transaction was a subterfuge to violate the law or whether it was in good faith a loan of whisky, and refused an instruction to the effect that if the jury found that defendant delivered whisky to McNeeley and in an hour and a half later McNeeley gave him money therefor, this would constitute a sale, and they should convict. The jury acquitted the defendant, and the state has appealed.

In *Cooper v. State*, 37 Ark. 412, it was held that "a sale is an exchange of goods or property for money paid or to be paid."

In *Gillan v. State*, 47 Ark. 555, 2 S. W. 185, it was held that giving liquor to a minor, or bartering it or exchanging it, was not within the terms of the statute prohibiting the sale. Chief Justice Cockrill, delivering the opinion of the court, said: "Where one commodity is exchanged for another of the same or ⁴⁶ different kind without agreement as to price or reference to money payment, the transaction is not a sale, but a barter or exchange"; citing cases.

In *Robinson v. State*, 59 Ark. 341, 27 S. W. 233, the court held the loan of whisky under an agreement that it should be returned in kind at some future date was not a sale within the meaning of the statute. The court said: "But whether he sold it, or only in good faith exchanged it for other liquor of the same kind, is a question of fact; and it is his right to have that question submitted to a jury, to be determined by them after a consideration of all the facts and circumstances surrounding the transaction." Here the facts fail to bring the case within the rule in *Robinson v. State*, 59 Ark. 341, 27 S. W. 233, and the court will not extend the rule of that case beyond the facts therein. There was an agreement for the return of the whisky in kind, and circumstances tended to prove a real loan. The borrower was sick and procured the

whisky to be used as medicine, under a promise that he would return it in kind.

This case lacks that agreement of return in kind and any circumstances indicating a loan in good faith. The transaction began with a request by McNeeley to purchase whisky of Brown. He said he could not sell it to him, but he would loan it to him, and the whisky sought was obtained under guise of a loan. Nothing was said of returning it in kind or quality, or any other indicia of a real loan. Had the transaction ended there, there would have been a jury question under the rule in *Robinson v. State*, 59 Ark. 341, 27 S. W. 233. But it did not end there. An hour and a half later McNeeley returns and asks the cost of whisky at that place, and was told it was sixty cents a pint, and then gave Brown one dollar and twenty cents for the two pints that he had ostensibly "borrowed," and told Brown to buy two pints for him and keep what he bought in place of what he had "borrowed."

"A loan (for consumption) is a transfer of personal property, such as corn or money, to be consumed by the borrower, and to be returned to the lender in kind and quality": *Kinne v. Kinne*, 45 How. Pr. 61.

This definition from Webster has been judicially affirmed; "To deliver to another for temporary use, on condition that the thing be returned; or to deliver for temporary use on condition ⁴⁷ that an equivalent in kind shall be returned with a compensation for its use": *Ramsey v. Whitbeck*, 81 Ill. App. 210.

Contrast a loan with a sale, as defined in 37 Ark. 412 (*Cooper v. State*): "A sale is an exchange of goods or property for money paid or to be paid." The facts here bring the case within the latter definition. Ostensibly, it began as a loan. But an hour and a half later the loan—if it were a loan—was turned into a sale by a payment of the price or value of the goods ostensibly loaned.

Taking the transaction in its entirety, there can be no doubt that it was a sale of whisky, and the court should have so instructed the jury.

Reversed and remanded.

Mr. Justice Battle dissenting.

The Question of What Constitutes an Illegal Sale of intoxicating liquor is discussed in the note to Barden v. Montana Club, 24 Am. St. Rep. 85.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. GRAHAM.

[83 Ark. 61, 102 S. W. 700.]

DEATH.—A Foreign Administrator may Maintain an Action for the wrongful death of his intestate. (p. 115.)

RAILROADS—Injury to Employé on Track—Presumption of Negligence.—Where a railway employé riding on a handcar is struck by a train, a presumption of negligence arises against the railway company, casting the burden upon it to show that a constant lookout was kept. (p. 116.)

RAILROADS—Lookout for Persons on Track.—The requirement of the Arkansas statutes that railroad companies shall keep a constant lookout for persons on their tracks applies to tracks within their yards as well as elsewhere, and is for the benefit of their employés as well as others. (p. 116.)

RAILROADS.—A Sufficient Lookout for Persons on the Track is not made out as a matter of law by evidence that a brakeman with a lantern was stationed on the tender of an engine which was backing up in the night-time at such speed that it could not stop short of fifty-five feet while the brakeman could not see over thirty feet. (p. 116.)

RAILROADS—Duty of Persons on Track to Keep Lookout.—It is the absolute duty of a person on a handcar to keep a lookout for trains in both directions. But as he cannot look both ways at once, he may reasonably be permitted to pay closer attention to the point from which danger is expected than to the other, though never to the extent of relaxing attention from the other direction further than necessary to give the required attention to the direction of most imminent danger. (p. 117.)

INSTRUCTIONS—Consideration of as a Whole.—It is generally impossible to state all of the case in one instruction; and if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others. (p. 118.)

INSTRUCTIONS.—It is not Reversible Error to give an instruction which is in general terms accurate, but which lacks an explanation fitted to the facts to make it entirely accurate in the case at bar, if the explanation is not requested and the attention of the court is not called to evidence requiring it. (p. 119.)

S. H. West and Gaughan & Sifford, for the appellant.

Smead & Powell and Scott & Head, for the appellee.

⁶² HILL, C. J. C. W. Luhrsen was a young man engaged in the civil engineering department of appellant railroad. He was recently graduated from the Agricultural and Mechanical College of Texas in civil engineering, and obtained employment from appellant in its engineering service at forty-five dollars per month about six weeks before his

death, which occurred on the 9th of October, 1900. He was then ⁶³ twenty-one years of age, and had graduated the preceding June. At the time of his death he was in company with J. D. Carter, a classmate of his, who had likewise obtained employment in the engineering corps under E. J. Nichols, assistant engineer in charge of the maintenance of way for the Camden Division. Luhrsen, Nichols and Carter were riding a railroad velocipede, commonly called by witnesses a "speeder." Nichols left them as they were nearing the city, in order to reach home sooner, as he anticipated that the speeder would be laid out by a freight engine which was switching in the yards, and it became the duty of Luhrsen and Carter to carry the speeder on to the station.

An ordinary freight engine was doing the switching for the local freight, which had shortly before reached Camden. In doing the switching, the engine with several cars attached to it had passed Luhrsen and Carter on the velocipede, they having got out of its way and got back on the track after the engine passed south. They started north again, watching for a passenger train from the north which was almost due. Just before they reached a trestle called the Ravine Trestle, they stopped, or nearly so, to look and listen for this passenger train. Not hearing or seeing it, they proceeded on their journey north, making about six miles an hour.

A short distance after passing the trestle they were overtaken by the said engine. It was backing with two cars attached to it, the tender foremost, and on the tender a brakeman was riding with a lantern, keeping a lookout. Carter saw the engine coming when it was seventy-five or a hundred feet back (south) of them. He jumped and called to his companion to jump. Luhrsen in jumping from the speeder became entangled with the wheel, and was run over and instantly killed. Carter escaped.

There was some evidence tending to prove that the engine was running from twelve to twenty miles an hour. The trainmen in charge of it say that it was running from six to ten miles an hour. Probably the consensus of their testimony would indicate a speed of about six miles, or a little more, per hour. This was in the yards of the company, and there was a rule of the company prohibiting a speed within the yard limits of over six miles an hour.

⁶⁴ Carter says that at the point at which Luhrsen was struck the velocipede with the two men upon it could have

been seen for a distance of about four hundred feet if the engine had been equipped with an ordinary headlight. Owing to a curve in the track, it would not have been in sight for more than four hundred feet. The accident occurred at 6:10 P. M., and the night was a cold, clear, starlight night. Carter says that an object the size of the speeder with two men upon it could have been seen by a man of ordinary vision at that time two hundred and fifty feet south of the point where Luhrsen was killed. The brakeman keeping lookout says he was keeping a careful watch, and the men on the speeder were only twenty feet away when he saw them; that he immediately gave the stop signal to the engineer, who brought the engine to a quick stop. That the engineer used every means in his power to bring the train to a quick stop, and that he made as good a stop as could have been made after receiving the signal, is undisputed. There is a conflict in the testimony as to how far the train ran after striking the velocipede before it was brought to a stop, ranging from fifty feet by the brakeman to one hundred and seven feet by Carter. There was testimony on behalf of appellant that the bell was continuously ringing while the train was traveling through the yards, while the testimony of Carter is that he failed to hear any bell ringing on the engine.

The track was slightly upgrade at the point of the accident, and the testimony on behalf of appellant is that the engine in question, running six to eight miles an hour, with the two cars attached, could have been stopped in about fifty-five or sixty feet. If the speed was greater, the distance would, of course, have been further.

Young Luhrsen was the only son of a family of five. By a family agreement, two of his sisters dropped their education to let him be advanced, and his father devoted his limited means to educate him, with the understanding that as soon as he could begin earning money he was to help educate his sisters. His father spent two thousand seven hundred dollars on his education, and the young man promised his father and his sisters that as soon as he could earn the money he would repay the same to his father for the education of his sisters. It was also shown ⁶⁵ that other contributions were made to him by his father, which were expected to be repaid in the same way. He was shown to be in fine physical condition, and a man of exemplary habits and fine character,

with an opportunity for advancement in his calling. The wages of men in the engineering corps of the appellant road ranged from forty dollars to one hundred and fifty dollars a month. He took the position with the railroad company with the expectation and intention that he could then begin repaying his father for the money advanced for his education. He had not drawn any money at the time he was killed.

This suit was an action by his father as administrator appointed by the county court of De Witt county, Texas. Afterward, W. H. Graham, the appellee, was substituted for the father as administrator. There was a recovery for the plaintiff for two thousand one hundred and fifty dollars, and defendant has appealed.

⁶⁷ 1. The first question presented is as to the right of a foreign administrator to maintain such an action in this state. This is an action founded upon Lord Campbell's Act, sections 6289 and 6290 of Kirby's Digest. The argument is made that a foreign administrator can recover in this state only for sums which would be assets for the payment of debts, and *Fairchild v. Hagel*, 54 Ark. 61, 14 S. W. 1102, is relied upon. But that decision cannot be taken to mean anything beyond the law as applied to the facts therein. It was dealing with a foreign administrator seeking to recover lands in this state, and what was said of that action was well said; but the decision does not apply to a state of facts where recovery is sought in a personal action by a foreign administrator for the benefit of the next of kin. The administrator in the *Hagel* case could not recover because an Arkansas administrator bringing a similar suit could not have recovered. The statute gave the foreign administrator no greater power than the home administrator, but did give him the same power to maintain suit. This question was fully considered by the supreme court of the United States in the case of *Dennick v. Central R. R. Co.*, 103 U. S. 11, 26 L. ed. 439. While there is some difference in the adjudications on this subject, the reasoning of Mr. Justice Miller, speaking for the court in that case, presents the better position. It was likewise held in *St. Louis etc. Ry. Co. v. Cleere*, 76 Ark. 377, 88 S. W. 995, that a foreign administrator ⁶⁸ could sue and recover under Lord Campbell's Act for injury in this state. It is true that that point was not pressed in argument, nor specifically considered by the court, but it was necessarily involved in the

question which was considered; that is, whether the marriage of a foreign administratrix terminated her right as administratrix to maintain suit in the state.

2. It is insisted that there was no evidence of negligence of the appellant, and that the court erred in submitting that question to the jury. The evidence that Luhrsen was killed by the running of a train gave rise to a presumption of negligence against the railroad company, casting upon it the burden to establish that constant lookout was kept; and the court so instructed the jury in the seventh instruction. This question was recently fully examined by this court in a case similar to this one—*St. Louis etc. Ry. Co. v. Standifer*, 81 Ark. 276, 99 S. W. 81.

This lookout must be kept in the yards of the company as well as on other parts of the track, and is for the benefit of employes of the company as well as others: *Little Rock etc. R. R. Co. v. McQueeney*, 78 Ark. 22, 92 S. W. 1120; *Kansas City S. Ry. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363.

The evidence on behalf of appellant is not sufficient for the court to say as a matter of law that this presumption is overcome, even if there were no evidence on behalf of appellee tending to establish negligence. The testimony of appellant is that there was a brakeman posted on the tender with a lantern, which cast its rays not exceeding thirty feet, and that, owing to such light, he could not have seen beyond that distance, and that the train running at the speed at which it was running could not have been stopped short of fifty-five or sixty feet. This evidence on behalf of appellant alone presented a question of fact to the jury as to whether an efficient lookout was being kept. If the operatives of the train circumscribe the vision of the lookout watchman by a lantern, and do not run its trains so slowly that it could stop within the vision of the watchman, then a question of fact is presented as to whether or not the lookout statute has been violated.

The evidence of appellee likewise presented a question for the consideration of the jury, as to whether the appellant was guilty of negligence. Mr. Carter testified that he and his companion ⁶⁹ could have been seen in their velocipede for two hundred and fifty feet before they were struck, by a man of ordinary vision, without any light, and if there was an ordinary headlight they could have seen four hundred feet.

The court sent this question to the jury under proper instruction—No. 2—which is set out in the margin.*

3. The question of the contributory negligence of Luhrsen is more difficult than the question of the negligence of the railroad company. According to the testimony most favorable to Luhrsen, the train was seen by his companion when it was only seventy-five or a hundred feet distant, whereas it could have been seen for a distance of two hundred and fifty to four hundred feet. If the train was running at the high rate of speed that some of the testimony indicates, the time consumed in running from the point where it could have been seen to the point where it was seen would have been but a very few seconds. And the failure to constantly watch would have been limited to an exceedingly short period of time. If the train was running only six or eight miles an hour, as the trainmen's testimony indicates, it was running but little faster than the velocipede; and six miles was the company's limit for running in the yards. Therefore, it is reasonable that Luhrsen and Carter were not expecting danger from being overtaken by this switch engine in the yards, and they were expecting a passenger train soon from the north and their attention was most sharply directed to it. While this court has said many times, and cannot repeat it too often, that it is the absolute duty of a person on a railroad track to keep a constant lookout both ways, yet it is physically impossible to be looking both ways at the same instant, and a man can reasonably be permitted to pay closer attention to the point from which danger is expected than to the other; however, never to the extent of relaxing attention from the other direction further ⁷⁰ than necessary to give the required attention to the direction of most imminent danger. This subject was fully considered in *St. Louis etc. Ry. Co. v. Tomlinson*, 78 Ark. 251, 94 S. W. 613, and again in *Chicago etc. Ry. Co. v. Baskins*, 78 Ark. 355, 93 S. W. 757. Other applications of it are found in *St. Louis etc. Ry. Co. v. Dillard*,

*"2. The law contemplates an efficient and watchful lookout, and not one which is merely perfunctory. A lookout who does not see what with due care could have been seen would not be in the proper discharge of his duty, and not the constant lookout contemplated by law. If, therefore, the jury believe that at the time of the alleged killing, the defendant was not keeping such lookout, or was maintaining a lookout who did not see the deceased when and as soon as with due care he should have been seen by such lookout, and thereby the deceased was killed by the train, the engine or tender of the defendant when in motion, then was the defendant guilty of negligence."

78 Ark. 520, 94 S. W. 617; *Scott v. St. Louis etc. Ry. Co.*, 79 Ark. 137, 116 Am. St. Rep. 67, 95 S. W. 490; *St. Louis etc. R. R. Co. v. Wyatt*, 79 Ark. 241, 96 S. W. 376.

It was proper for the question of contributory negligence to be submitted to the jury, and it was properly submitted.

4. Criticisms are made of some of the instructions, in that they seem to permit a recovery if the jury find the defendant guilty of negligence, without the qualification "and unless they find the deceased not guilty of contributory negligence." Taking these instructions as a whole, the court think they make it clear to the jury that contributory negligence on the part of deceased would defeat a recovery, even should they find the defendant guilty of negligence. It is generally impossible to state all the law of the case in one instruction; and if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others: *Brinkley Car Works v. Cooper*, 75 Ark. 325, 87 S. W. 645; *St. Louis etc. Ry. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249.

5. Exception is taken to the sixth instruction on the measure of damages. The instruction is as follows: "6. If, under the evidence and instructions in this case, the jury find for the plaintiff under the first count in the complaint, they will return a verdict in favor of the plaintiff for the benefit of the father of the deceased for such sum of money as they believe the defendant would, under the testimony, have given or paid said father or laid out and expended for his benefit, had the deceased not been killed." The objection is that the evidence shows that the son expected to repay his father for the sums expended on his education from his earnings, and necessarily such payments would be in installments and likely run over several years; and this instruction contemplates the entire sum which would be repaid, without taking into consideration the present value of the deferred installments. The instruction in general terms ⁷¹ is correct, but in view of the evidence, which would indicate that the payments would run over quite a period in the future, it should have been explained that the present value of such deferred payments, and not the entire sum of the payments, should be found. Had appellant called the attention of the lower court to the evidence in this regard and asked such ex-

planation of the instruction, it doubtless would have been given. The court does not think that it is a reversible error to have given an instruction which is in general terms accurate but which lacked an explanation fitted to the facts to make it entirely accurate in this instance, if an explanation was not requested in the lower court, and the attention of the trial court not called to the evidence requiring the explanation. Of course, it would have been different if the instruction was in itself erroneous. But it is not abstractly wrong. There is no indication that the jury was misled by it, because the verdict is less than the evidence would have justified the jury in giving.

Judgment affirmed.

Actions for the Wrongful Death of a human being are discussed in the note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 669. An action may be maintained by an administrator appointed in another state to recover for the negligent killing of his intestate in this state, such appointment having been made at the domicile of the decedent: *Robertson v. Chicago etc. Ry. Co.*, 122 Wis. 66, 106 Am. St. Rep. 925. See, further, *Romano v. Capital City Brick etc. Co.*, 125 Iowa, 591, 106 Am. St. Rep. 323; *Maiorano v. Baltimore etc. R. R. Co.*, 216 Pa. 402, 116 Am. St. Rep. 778.

The Duties of Railroad Companies toward employes riding on hand-cars or velocipedes is considered in the recent cases of *Wabash R. R. Co. v. Erb*, 36 Ind. App. 650; *Cleveland etc. Ry. Co. v. Workman*, 66 Ohio St. 509, 90 Am. St. Rep. 602.

DOWNS v. DENNIS.

[83 Ark. 71, 102 S. W. 699.]

AN EXECUTION SALE for an Amount Largely in Excess of the true indebtedness, as where the judgment has been paid in part and the purchaser has notice of the payment, is void. (p. 120.)

Downs & Whitley, for the appellant.

Wright Prickett, for the appellee.

⁷² HILL, C. J. The facts as found by the chancellor (and his finding is sustained by the evidence), so far as necessary to determine this appeal, may be stated as follows:

Pumphrey obtained a judgment in justice's court in October, 1900, against Galentine for \$27.80 and costs. Galentine filed a stay bond, with S. A. Downs, the appellant, and J. K. Loyd as sureties. In May, 1901, Galentine paid into court on said judgment \$25, leaving a balance due of \$2.80 and costs. In November, 1901, the judgment was assigned to

Downs. The judgment at the time of the assignment was \$6.00, including costs of \$4.10. On the 24th of February, 1903, after a nulla bona return, transcript was filed in the office of the circuit clerk under section 4631 of Kirby's Digest. Execution issued upon this judgment on the 9th of March, 1903, for \$27.80 and \$7.10 costs. A lot in Mena was levied upon and sold under said execution, and was bought by the said Downs for \$45, the execution at that time showing judgment and costs amounting to \$42.40. ⁷³ A certificate of purchase was issued to Downs, and subsequently a sheriff's deed was made to him.

The question to be determined on this appeal is whether the title acquired by Downs through said execution sale is good. An interesting question has been discussed as to whether a judgment rendered for more than \$10, but which has been reduced to less than \$10 by payments, can be filed as a circuit court judgment under section 4631 of Kirby's Digest; but before that question is reached there is another which is decisive of the case.

There was a credit of \$25 upon the judgment, which reduced the face of it to \$2.80. This payment was made before the judgment was filed with the circuit clerk, and no credit was shown in the transcript filed in the office of the circuit clerk, and no credit appears upon the execution issued thereupon. At the time of the sale the amount of the judgment and costs purported to be \$42.40, and that was the sum for which the property was sold, when as a matter of fact the principal of the judgment was only \$2.80 instead of \$27.80. This principle, laid down by Chief Justice Lewis in the case of *Hastings v. Johnson*, 1 Nev. 613, has been expressly approved by this court: "That an execution issued and sale of property made, when there is no judgment authorizing it, would be utterly void, there can be no doubt, and for the same reason we think that an execution and sale for a sum exceeding that actually due upon the judgment would be equally void, because there is no judgment to authorize the collection of the excess for which execution is issued. When the discrepancy between the judgment and the execution is a mere trifle, levy and sale will not be disturbed, because it is said *lex non curat de minimis*; but when the discrepancy is material, it cannot be overlooked or disregarded by the courts": *Hightower v. Handlin*, 27 Ark. 20.

The maxim of *lex non curat de minimis* cannot be applied to this case. The sale of this real estate for an amount materially in excess of the amount due rendered the purchase at that sale by Mr. Downs, who caused the same to be done, void. No question is involved in this case as to the right of third parties builded upon records apparently regular, as Mr. Downs knew the payment had been made, received the benefit of the ⁷⁴ same as surety upon the stay bond, and yet procured a sale for an amount materially in excess of the amount due on the judgment. He cannot sustain a title acquired through such sale.

Judgment is affirmed.

As Execution upon a satisfied judgment and a sale thereunder will be set aside on motion: Russell v. Hugunin, 1 Scam. 562, 33 Am. Dec. 423.

KAUFMAN v. UNDERWOOD.

[83 Ark. 118, 102 S. W. 718.]

A LANDLORD cannot Claim a Lien on the crop of his tenant as for supplies furnished the tenant when the landlord did nothing more than to become surety for the tenant for the payment of a horse. (p. 122.)

Priddy & Chambers, for the appellant.

W. D. Jacoway, for the appellee.

¹¹⁸ HILL, C. J. Tedder was a tenant of Underwood, and mortgaged his crop to Kaufman & Wilson, and this is a contest between the mortgagees and the landlord as to the prior rights to two bales of lint cotton raised upon the place. Underwood's contention is that he has a lien under section 5033 of Kirby's Digest in having supplied his tenant with a horse, and that under said section his lien was superior to that of the mortgagee. The horse was purchased from J. M. Harkey's Sons, and a note was executed to them in which title to the horse was reserved, and it was signed by Tedder first, and Underwood signed his name under Tedder's.

There is a conflict in the testimony as to whether Underwood bought the horse from the Harkeys and supplied it to Tedder, or whether Tedder bought it from the Harkeys and

Underwood went his surety. Taking the testimony as a whole, it impresses the court that Tedder purchased the horse of the Harkeys, and his landlord went his surety. The written evidence of the sale strongly indicates that to have been the fact. While Underwood and Harkey now remember it as a sale to Underwood, yet at the time of the sale they made out the ¹¹⁹ evidence of it as to a sale to Tedder, and that view is in conformity to the other testimony. The landlord's lien is primarily for rent, and has been extended by the statute to advances of necessary money, supplies, stock, etc.: *Few v. Mitchell*, 80 Ark. 243, 96 S. W. 983.

A party must bring himself within the terms of it before his lien will be superior to a contractual one. The court is of the opinion that such was not the case here.

Judgment is reversed and cause dismissed.

THE RIGHT OF A LANDLORD TO A LIEN ON THE PROPERTY OF HIS TENANT.

- I. By the Common Law, 122.
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I. By the Common Law.

At the common law a landlord has no lien for rent, merely by virtue of his position as lessor, upon the crops or other property of his tenant, but only a right to distrain: *Hitchcock v. Hassett*, 71 Cal. 331, 12 Pac. 228; *Johnson v. Emanuel*, 50 Ga. 590; *Herron v. Gill*, 112 Ill. 247; *Powell v. Daily*, 163 Ill. 646, 45 N. E. 414; *Grant v. Whitwell*, 9 Iowa, 152; *Arbuckle v. Nelms*, 50 Miss. 556; *Howland v. Forlaw*, 108 N. C. 567, 13 S. E. 173.

II. By Reason of an Express Agreement.

a. Creation of Lien.—It certainly is competent for the parties to a lease to stipulate that the landlord shall have a lien on the crops or chattels of the tenant; and this lien may be given in express terms or it may arise as a necessary implication from the language of the writing: *Foster v. Reid*, 78 Iowa, 205, 16 Am. St. Rep. 437, 42 N. W. 649; *Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822, 33 N. W. 117; *Wright v. Bircher's Exr.*, 72 Mo. 179, 37 Am. Rep. 433; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Reynolds v. Ellis*, 103 N. Y. 115, 57 Am. Rep. 701, 8 N. E. 392; *Whited v. Hamilton*, 15 Hun, 275; *Smith v. Taber*, 46 Hun, 313; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626; *Greeley v. Winsor*, 1 S. Dak. 117, 36 Am. St. Rep. 720, 45 N. W. 325; note to *DeVaughn v. Howell*, 14 Am. St. Rep. 166. A clause in a lease that the lessor shall have a lien for rent on the exempt property of the lessee creates a lien by contract: *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. 650. And a lien for rent exists where the lease provides for a re-entry; that is, a right, upon default in the payment of rent, to repossess the demised premises: *Stephenson v. Haines*, 16 Ohio St. 478; *Appeal of Spangler*, 30 Pa. 277. But a stipulation in a lease that the lessee shall not dispose of the chattels on or the produce of the premises until the rent is paid is regarded as a personal covenant and ineffectual as a reservation of a lien: *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597; *Bleakley v. Sullivan*, 140 N. Y. 175, 35 N. E. 433; *Beers v. Field*, 69 Vt. 533, 38 Atl. 270. And a lease assuming to reserve to the lessor control of all the produce of the soil and the right to dispose thereof has been thought ineffectual to create a lien: *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801.

b. Nature of Lien.—A stipulation in a lease giving the lessor a lien on the crops or other personal property of the lessee is regarded by most authorities as in legal effect a chattel mortgage, and as governed by the rules applicable to such mortgages, including the matter of registration: *Mitchell v. Bodgett*, 33 Ark. 387; *Borden v. Croak*, 131 Ill. 68, 19 Am. St. Rep. 23, 22 N. E. 793; *Blakemore v. Taber's Exr.*, 22 Ind. 466; *Sioux Valley State Bank v. Hounold*, 85 Iowa, 352, 52 N. W. 244; *Kelley v. Goodwin*, 95 Me. 538, 50 Atl. 711; *Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822, 33 N. W. 117; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Greeley v. Winsor*, 1 S. Dak. 117, 36 Am. St. Rep. 720, 45 N. W. 325; *Esshom v. Watertown Hotel Co.*, 7 S. Dak. 74, 63 N. W. 229; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003. Other authorities, however, do not give such agreements the legal effect of a chattel mortgage; but regard the lien which they create as an equitable lien: *Dalton v. Landahn*, 27 Mich. 529; *Metcalf v. Fosdick*, 23 Ohio St. 114; *Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676; *Hume v. Riggs*, 12 App. Cas. (D. C.) 355. The general policy of the law, however, is against upholding secret liens, and subsequent bona fide purchasers or encumbrancers are protected

against them: *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. 1018; *Holmes v. Holifield*, 97 Ill. App. 185; *Gandy v. Dewey*, 28 Neb. 175, 44 N. W. 106.

c. Property Subject to Lien.

1. **In General.**—As between the parties themselves, a lien reserved in a lease covers all the property which it was intended to cover, but as to third persons it covers only such property as it embraces in express terms: *Attaway v. Hoskinson*, 37 Mo. App. 132. The description should be definite and susceptible of being made certain. It seems, however, that a description in general terms of all the personal property of a particular kind on the premises, is sufficient, yet if the lien is regarded as in legal effect a chattel mortgage, it would seem that the same certainty is requisite as in the case of chattel mortgages: *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85; *McClain v. Abshire*, 72 Mo. App. 390; *Buskirk v. Cleveland*, 41 Barb. 610. General terms of description are usually limited to the particular kinds of property mentioned immediately preceding: *Kuschell v. Campan*, 49 Mich. 34, 12 N. W. 899. A lien upon furniture and household goods does not cover liquors and groceries: *Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676. Furniture is not included under buildings and improvements: *Willard v. World's Fair Encampment Co.*, 59 Ill. App. 336; nor under mere trade fixtures: *Ex parte Morrow*, 1 Low. 386, Fed. Cas. No. 9850. Horses, harnesses, and wagons, used in delivering goods to customers, are not included under goods, wares and merchandise: *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334.

2. **Property of Third Persons.**—Obviously, an agreement by a lessor and lessee for a landlord's lien can ordinarily create no lien on the property of third persons placed on the premises without notice of the agreement: *Beecher v. Bartlett*, 42 Mich. 60, 3 N. W. 255. However, a subtenant, with knowledge that his lessor is a tenant, is chargeable with notice of, and is bound by the terms of, the original lease. Hence, if that lease gives the landlord a lien for rent on the crops grown upon the premises, the lien extends to crops grown by the subtenant: *Foster v. Reid*, 78 Iowa, 205, 16 Am. St. Rep. 437, 42 N. W. 649. And if a lease provides that the lessor shall have a lien on buildings and improvements erected on the demised land, the lien extends to buildings erected by a licensee or lessee of the tenant: *Willard v. Rogers*, 54 Ill. App. 583.

3. **After-acquired Property.**—It is generally conceded that a valid contract lien may be acquired on buildings or improvements yet to be erected on the premises by the tenant: *Webster v. Nichols*, 104 Ill. 160; and upon after-acquired chattels: *Wright v. Bircher's Exr.*, 72 Mo. 179, 37 Am. Rep. 433; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Reynolds v. Ellis*, 103 N. Y. 115, 57 Am. Rep. 701, 8 N. E. 392; and also upon crops to be grown: See the note to *De Vaughn v. Howell*, 14 Am. St. Rep. 166; *Kelley v. Goodwin*, 95 Me. 538, 50 Atl. 711. See, also, the note to *Forsyth Mfg. Co. v. Castlen*, 81 Am. St. Rep. 44. In

some jurisdictions, however, a contrary rule seems to prevail: *Vinson v. Hallowell*, 73 Ky. (10 Bush) 538; *Brown v. Neilson*, 61 Neb. 765, 87 Am. St. Rep. 525, 86 N. W. 498, 54 L. R. A. 328. Thus, in a recent Nebraska case, it is affirmed that a stipulation in a lease for a lien on crops to be raised on the demised premises is ineffectual to create either a legal or an equitable lien on crops thereafter grown on the land: *Thostesen v. Doxsee* (Neb.), 110 N. W. 567.

The lien of a landlord will not attach to the after-acquired property of the tenant in the absence of some description in the lease or agreement identifying such property. A clause in a lease giving the landlord a first lien upon all property belonging to the lessee covers only property owned by the tenant at the time of the execution of the lease: *Borden v. Croak*, 131 Ill. 68, 19 Am. St. Rep. 23, 22 N. E. 793; *Powell v. Daily*, 163 Ill. 646, 45 N. E. 414. And a clause giving a lien upon all goods, chattels, or "other property" belonging to the tenant will not create a lien on subsequently erected buildings, fixtures and machinery: *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955. A description of crops is sufficient which specifies the entire crop of the tenant, consisting of a certain number of acres of cotton to be grown during the year for which supplies are furnished, where the land mentioned in the contract is all that the tenant has under cultivation, and cotton is only the crop grown thereon: *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85.

4. **Exempt Property.**—A provision in a lease that the rent charge shall be a lien on the personal property or crops of the tenant, whether exempt from execution or not, has been held valid as mortgage, and governed, in the matter of priority over other liens, by the recording laws: *Fejavary v. Broesch*, 52 Iowa, 88, 35 Am. Rep. 261, 2 N. W. 963; *Sioux Valley State Bank v. Hounold*, 85 Iowa, 352, 52 N. W. 244; *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. 650. In Illinois, an agreement that a landlord shall have a lien on the exempt property of his tenant is regarded as invalid as a waiver of the right of exemption: *Curtiss v. Ellenwood*, 59 Ill. App. 110.

III. By Force of Statutory Enactments.

a. **In General.**—The statutes of many of the states now give landlords a lien on the chattels which tenants bring upon the demised premises, and, in the case of agricultural lands, upon the crops raised thereon. This lien does not change the ownership of these properties from the tenant to the landlord, nor put any restraint on the unqualified right of the tenant to use and possess them, except in so far as is necessary to the preservation of the lien. The legal title and the right to possession remains in the tenant, simply charged with the lien of the landlord: *Scaife & Co. v. Stovall*, 67 Ala. 237; *Bell v. Matheny*, 36 Ark. 572; *Worrill v. Barnes*, 57 Ga. 404; *Frink v. Pratt*, 130 Ill. 327, 22 N. E. 819; *Travers v. Cook*, 42 Ill. App. 580; *Hardeman v. Shumate*, 19 Tenn. (Meigs) 398; *Laux v. Glass*, 1 White & Willa. Civ. Cas. Tex. Ct. App. 1180.

There is no objection on constitutional grounds to statutes giving landlords a lien where the law is made to apply to all of a class: *Burket v. Boude*, 33 Ky. (3 Dana) 209; *State v. Flmore*, 68 S. C. 140, 46 S. E. 939. Such statutes, however, have no retrospective operation: *Hardy v. Ingran*, 84 Ala. 544, 4 South. 372; *Flower v. Skipwith*, 45 La. Ann. 895, 13 South. 152. Neither do they invalidate any prior existing lien or mortgage: *White v. Thomas*, 52 Miss. 49; nor interfere with the pre-existing rights of parties to a lease: *Weed v. Standley*, 12 Fla. 166; *Durhal v. Speeke*, 82 N. C. 87. The statute enters into and forms a part of every lease or contract of renting: *Smith v. Huddleson*, 103 Ala. 223, 15 South. 521.

b. **Time When Lien Attaches.**—The statutory lien of a landlord attaches at the beginning of the tenancy, or when the chattels are brought upon the premises, and, in the case of crops, from the commencement of their growth, whether or not the rent is then due: *Seisel v. Folinar*, 103 Ala. 491, 15 South. 850; *Sevier v. Shaw*, 25 Ark. 417; *Smith v. Meyer*, 25 Ark. 609; *Watt v. Scofield*, 76 Ill. 261; *Harvey v. Hampton*, 108 Ill. App. 501; *Garner v. Cutting*, 32 Iowa, 547. In Georgia, a landlord's special lien for rent upon a crop takes effect upon the maturity of the crop, and his special lien on the crop for supplies furnished arises when they are furnished: *Cochran v. Waits*, 127 Ga. 93, 56 S. E. 241. The lien does not depend upon a levy. It exists independently of the institution of any proceeding for its enforcement. The remedy by levy or distress is simply to enforce a lien already existing: *Weil v. McWhorter*, 94 Ala. 540, 10 South. 131; *Smith v. Hoddleston*, 103 Ala. 223, 15 South. 521; *Cochran v. Waits*, 127 Ga. 93, 56 S. E. 241; *Wetsel v. Mayers*, 91 Ill. 497; *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313; *Wester v. Long*, 63 Kan. 876, 66 Pac. 1032; *Fitzgerald v. Fowlkes*, 60 Miss. 270; *Berkey etc. Furniture Co. v. Sherman Hotel Co.*, 81 Tex. 135, 16 S. W. 807; *Polk v. King*, 19 Tex. Civ. App. 666, 48 S. W. 601.

c. **Creation and Character of Tenancy.**—It is, of course, essential to the creation of the lien that the relation of landlord and tenant in fact exists between the parties: *Walters v. Meyer*, 39 Ark. 560; *Smith v. Maberry*, 61 Ark. 515, 33 S. W. 1068; *Saterfield v. Moore*, 110 Ga. 514, 35 S. E. 638; *Liles v. Price* (Tex. Civ. App.), 51 S. W. 526. It is not material how the relation is created, so long as it exists in fact. Thus contracts for the sale of land may subsequently be modified so that the vendee becomes a tenant, and the vendor a landlord: *Powell v. Hadden's Exrs.*, 21 Ala. 745; *Bacon v. Howell*, 60 Miss. 362; *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214. The relation exists where the tenant holds over after the term stipulated: *Abraham v. Nicrosi*, 87 Ala. 173, 6 South. 293; and where the lease contains a provision for conveyance after the payment of certain rents: *Crinkley v. Egerton*, 113 N. C. 444, 18 S. E. 669. It would seem that where a lease rests in parol, but the tenant takes possession and thus executes the agreement, that the relation of landlord and tenant is created so that the

former has a lien: *Nelson v. Webb*, 54 Ala. 436; *Martin v. Blanchett*, 77 Ala. 288; *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313; *Appeal of Greenwood*, 79 Pa. 294. But there is a holding to the contrary in *Hill v. Gilmer* (Miss.), 21 South. 528. Mere permission to occupy premises, on the condition of their return when requested, does not make the parties lessor and lessee: *Fisk v. Moores*, 11 Rob. (La.) 279. It is not necessary, however, that there should be an express contract to pay rent. Such agreement may be implied: *Love v. Law*, 57 Miss. 596.

d. **Recording of Lease.**—The filing or recording of the contract of lease is not a prerequisite to the right of the landlord to a statutory lien: *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313; *Davis v. Days*, 42 S. C. 69, 19 S. E. 975.

e. **Property Subject to Lien.**

1. **In General.**—The property to which the statutory lien of a landlord attaches depends upon the terms of the statute. In some states the statutes make all of the tenant's property situated on the demised premises subject to the lien; in other states the statutes specify certain chattels subject to the lien: *Becker v. Dalby* (Iowa), 86 N. W. 314; *Burket v. Boude*, 33 Ky. (3 Dana) 209; *Livingston v. Wright*, 68 Tex. 706, 5 S. W. 404; *Freeman v. Collier Packet Co.* (Tex.), 101 S. W. 202. By giving a lien on specified property, such as crops, the statute by implication excludes the idea of a lien on other property: *Herron v. Gill*, 112 Ill. 247; *Felton v. Strong*, 37 Ill. App. 58. If the statute gives a lien on all the property, the landlord does not owe the duty to the tenant of enforcing the lien against any particular portion of the property: *Citizens' Sav. Bank v. Woods* (Iowa), 111 N. W. 929.

The term "effects" is construed to mean property of the same general nature as "goods" and "furniture." It does not include a leasehold: *McKleroy v. Cante*y, 95 Ala. 295, 11 South. 258; *First Nat. Bank v. Consolidated Electric Light Co.*, 97 Ala. 465, 12 South. 71. All property situated "in the residence" has been held to include all property on the premises: *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257. Where the statute provides that the landlord of a building shall have a lien on the goods and effects belonging to the tenant, all property used in connection with the tenancy, whether in or out of the building, is subject to the lien: *Stephens v. Adams*, 93 Ala. 117, 9 South. 529. But where the statute gives the lessor of a building a lien on the property of the tenant therein (*Marsalis v. Pitman*, 68 Tex. 624, 5 S. W. 404; *Livingstone v. Wright*, 68 Tex. 706, 5 S. W. 407), the lessor of a lot has no lien on improvements thereon erected: *Meyer v. O'Dell*, 18 Tex. Civ. App. 210, 44 S. W. 545; *Rush v. Henley* (Tex. Civ. App.), 15 S. W. 201. Horses and wagons not kept on the premises, but used to deliver goods, have been held not subject to a lien: *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334. But cattle kept for feeding and improving, when the premises are rented for keeping livestock thereon for sale, are subject to a lien: *Thompson v. Anderson*, 86 Iowa, 703, 53 N. W. 418.

2. Exempt Property.—In some jurisdictions the statutory lien of a landlord does not attach to such property of the tenant as is exempt from execution or forced sale: *Bacon v. Carr*, 112 Iowa, 193, 83 N. W. 957; *The Richmond v. Cake* (D. C.), 1 App. Cas. 447. But in some states the landlord's lien on crops is superior to the claim of the debtor under the exemption statutes: *Harrell v. Fagan*, 43 Ga. 339; *Hill v. George*, 38 Tenn. (1 Head) 394; *Stokes v. Burney*, 3 Tex. Civ. App. 219, 22 S. W. 126; *Champion v. Shumate*, 90 Tex. 597, 39 S. W. 128, 362, 40 S. W. 394. Where the statute declares that the landlord shall have a lien upon all crops grown upon the demised premises, and upon any other personal property the tenant has used thereon during the term, and not exempt from execution, the words "not exempt from execution" refer only to "the other personal property," and not to the crops: *Hipsley v. Price*, 104 Iowa, 282, 73 N. W. 584. In Alabama the lien of a landlord does not extend to a mule and dray used by the tenant in connection with his mercantile business: *Kleroy v. Cantey*, 95 Ala. 295, 11 South. 258.

3. Property of Third Persons.—The property of third persons on the demised premises is ordinarily not subject to the statutory lien of the landlord: *Perry v. Waggoner*, 68 Iowa, 403, 27 N. W. 292; *Davis v. Washington*, 18 Tex. Civ. App. 67, 43 S. W. 585; *Johnson v. Douglass*, 2 Mackey (D. C.), 36. Goods in possession of a tenant on consignment are not subject to the lien: *Needham Piano etc. Co. v. Hollingsworth* (Tex. Civ. App.), 40 S. W. 750. The individual property of one partner used and kept on leased premises is not subject to a lien for rent due from the firm: *Ward v. Walker*, 111 Iowa, 611, 82 N. W. 1028. And the personal property of a wife used on the demised premises is not liable to attachment for rent if the lease was executed by the husband alone: *Schurz v. McMenamy*, 82 Iowa, 432, 48 N. W. 806.

4. Crops Grown on Premises.—The statutes of the various states generally provide that lessors of agricultural lands shall have a lien, for rents and for advances made or supplies furnished, on the crops grown on the demised premises: *Miles v. James*, 36 Ill. 399; *Thompson v. Mead*, 67 Ill. 395; *Marquess v. Ladd*, 30 Ky. Law Rep. 1142, 100 S. W. 305; *Reynolds v. Taylor*, 144 N. C. 165, 56 S. E. 871. This lien usually extends to the entire crop and every part thereof: *Lemay v. Johnson*, 35 Ark. 225; *Knowles v. Sell*, 41 Kan. 171, 21 Pac. 102; *State v. Reeder*, 36 S. C. 497, 15 S. E. 544. In Arizona the lien is limited to crops grown upon the homestead: *Hoopes v. Brier* (Ariz.), 80 Pac. 327. One who rents separate parcels to the same tenant has, for the rent of each, a lien on the crops grown on that parcel only: *Nelson v. Webb*, 54 Ala. 436.

The statutory lien of a landlord on the crop of his tenant extends not only to the crop raised by the tenant, but also to the crop raised by subtenants: *Givens v. Easley*, 17 Ala. 385; *Agee v. Mayer*, 71 Ala. 88; *Foster v. Goodwin*, 82 Ala. 384, 2 South. 895; *Houghton v. Bauer*, 70 Iowa, 314, 30 N. W. 577; *Berry v. Berry*, 8 Kan. App. 584, 55 Pac.

348; *Applewhite v. Nelms*, 71 Miss. 482, 14 South. 443; at least, where the subletting has been without the assent of the landlord: *Andrew v. Stewart*, 81 Ga. 53, 7 S. E. 169; *Thompson v. Commercial Guano Co.*, 93 Ga. 282, 20 S. E. 309; *Stokes v. Burney*, 3 Tex. Civ. App. 219, 22 S. W. 126; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481. The lien attaches, although the subtenant has paid his rent: *Rutledge v. Walton*, 12 Tenn. (4 Yerg.) 458. A subtenant's crop may be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount: *Montague v. Mial*, 89 N. C. 137; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481.

5. **Notes, Accounts, and Choses.**—The statutory lien of a landlord is generally held not to extend to notes, drafts, accounts and other choses in action: *McKleroy v. Cantey*, 95 Ala. 295, 11 South. 258; *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334. A contrary view, however, seems to prevail in Louisiana: *Matthews v. His Creditors*, 10 La. Ann. 718; *Succession of Stone*, 31 La. Ann. 311.

f. Indebtedness for Which Lien can be Claimed.

1. **In General.**—The statutory lien of a landlord is generally given for the rent, and, in case of agricultural lands, for advances and supplies. Under a statute giving a lien for rent, the landlord cannot assert a lien for other indebtedness than that arising from the leasing of the premises. In order to have a lien for rent, he must show that his claim is for rent; and if he so blends his rent account with other items that the two cannot be segregated, he is presumed to have waived his right to a lien: *Roth v. Williams*, 45 Ark. 447; *Crill v. Jeffrey*, 95 Iowa, 634, 64 N. W. 625; *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787; *Sioux City First Nat. Bank v. Flynn*, 117 Iowa, 493, 91 N. W. 784. He cannot assert a lien for taxes which the tenant covenanted to pay: *Binns v. Hudson*, 5 Binn. (Pa.) 505; nor for damages occasioned by a breach of the terms of the lease in not attending the crops and cultivating the soil in a negligent manner: *Wilkinson v. Ketler*, 59 Ala. 306; *Few v. Mitchell*, 80 Ark. 243, 96 S. W. 983. As is said by the Arkansas court in the case last cited, and reiterated by that court in the principal case, the lien cannot be extended beyond the terms of the statute. In some jurisdictions, however, the statutory lien of a landlord extends to the costs of legal proceedings necessary to recover the rents: *Slaughter v. Winfrey*, 85 N. C. 159.

2. **Rents Accrued and to Accrue.**—In some jurisdictions the lien of a landlord for rents is restricted to rents due (*Forman v. Proctor*, 48 Ky. (9 B. Mon.) 124), and certain in amount: *Glasgow v. Ridgeley*, 11 Mo. 34; *Central Bank v. Peterson*, 24 N. J. L. 668. In other jurisdictions the lien attaches for all the rent to become due during the term of the lease: *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 South. 475; *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92; *Gilbert v. Greenbaum*, 56 Iowa, 211, 9 N. W. 182; *Marsalis v. Pitman*, 68 Tex. 624, 5 S. W. 404; *Livingston v. Wright*, 68 Tex. 706, 5 S. W. 407. In case the

chattels are attached or seized under execution, it has been said that the lien extends only to so much rent as has accrued at the time of the levy: *Denham v. Harris*, 13 Ala. 465; *Washington v. Williamson*, 23 Md. 244; *Trappan v. Morie*, 18 Johns. 1; *Theriat v. Hart*, 2 Hill, 380; *Harris v. Damman*, 3 Mackey, 90.

3. **Advances Made and Supplies Furnished.**—In many states the statutes give a lessor of agricultural lands a lien on the crops of the tenant for advances made or supplies furnished to aid in making the crops. In order for a landlord to have a lien for supplies furnished or money advanced, it has been thought that he must furnish or advance the same himself. If he merely becomes a surety or guarantor for money advanced or supplies furnished by a third person, he is not entitled to a lien: *Swann v. Morris*, 83 Ga. 143, 9 S. E. 767; *Ellis v. Jones*, 70 Miss. 60, 11 South. 566; *Kelley v. King*, 18 Tex. Civ. App. 360, 44 S. W. 915. A landlord, having, as surety with his tenant and another person, signed a note for supplies purchased by the tenant, but having purchased or ordered them himself, cannot have a lien therefor on the crop: *Brimberry v. Mansfield*, 86 Ga. 792, 13 S. E. 132. If the tenant signs a note for the price of supplies, and the landlord, though he indorses the same or signs it as surety, is in fact the real purchaser, he will be entitled to his lien; but if the tenant is the purchaser in the first instance, and the landlord, without his knowledge or consent, upon a private understanding with the seller of supplies, indorses the tenant's note given for them, no lien arises: *Scott v. Pound*, 61 Ga. 579; *Rodgers v. Black*, 99 Ga. 139, 25 S. E. 23. See, too, the decision of the supreme court of Arkansas in the principal case. In *Powell v. Perry*, 127 N. C. 22, 37 S. E. 71, it is affirmed that where supplies are furnished a tenant on the credit of his landlord, for which he promises to be responsible, a lien therefor arises. In *Clanton v. Eaton*, 92 Ala. 612, 8 South. 823, it is affirmed that when advances are made by a third party, it is essential to the existence of a lien that he shall look to the landlord for payment, though the advances may have been made at his instance and request. It generally is essential to the creation of a lien for supplies, however, that they be furnished to or at the instance of the tenant who makes the crop: *Reynolds v. Hindman*, 88 Ga. 314, 14 S. E. 471.

Advances made before the tenant begins to put in his crop will give rise to a lien: *Ragsdale v. Kinney*, 119 Ala. 454, 24 South. 443. Not every advance, however, which a landlord makes to his tenant comes within the statute. It must be of some one or more of the articles enumerated, and for some one or more of the purposes mentioned in the statute. Otherwise, there is no lien. A landlord has no lien for advances made to his tenant as a hired laborer, to be paid for by his labor: *Powell v. State*, 84 Ala. 444, 4 South. 719; nor for the pasturage of stock and the hire of a team, when they are not used by the tenant in cultivating the land: *Tucker v. Thomas*,

35 Tex. Civ. App. 499, 80 S. W. 649. But a landlord may have a lien for boarding his tenant and family: *Jones v. Eubanks*, 86 Ga. 616, 12 S. E. 106; *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797; or for furnishing him mules with which to work the soil: *Trimble v. Durham*, 70 Miss. 295, 12 South. 207; or for supplying him with tools to aid in making, gathering, or preserving the crop: *Earl v. Malone (Ark.)*, 96 S. W. 1062.

“An advancement, in the sense of the statutes, is anything of value pertinent for the purpose to be used directly or indirectly in making and saving the crops, supplied in good faith to the lessee by the landlord. Many things are in their nature and adaptation per se pertinent for such purpose, and presumptively constitute advancements whenever so supplied. Thus, subsistence for the tenant and his employes and work animals, appropriate farming implements, and the like, are advancements when so supplied. These and other things are directly appropriate for such purpose, and when supplied to that end make advancements. They are presumed to be such. There are other things not directly so appropriate, such as shoes, tobacco, dry-goods, groceries, and the like, which the landlord may supply to the lessee to pay his laborers. When such supplies are made, whether they make advancements or not depends on whether they were supplied for the purpose specified. It must appear affirmatively that they were. That the lessee diverts such things from the purpose contemplated cannot change their nature and the purpose of them”: *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797, citing *Womble v. Leach*, 83 N. C. 84; *Ledbetter v. Quick*, 90 N. C. 276. To the same effect, see *Cockburn v. Watkins*, 76 Ala. 486. It is of the very nature of an advancement, however, that it be something furnished the tenant which he did not before possess. The mere forbearance to demand something due from him in one year does not give a lien on products of the premises for the next year: *Lumbley v. Gilruth*, 65 Miss. 23, 3 South. 77.

ROSS v. DESHA LEVEE BOARD.

[83 Ark. 176, 103 S. W. 380.]

CONSTITUTIONAL LAW—Summary Destruction of Hogs.—A statute which, for the purpose of protecting levees from the rooting of hogs, in effect makes the running at large of hogs upon levees or within one hundred feet of their base a nuisance, subject to be abated by killing the animals, is constitutional. (p. 135.)

X. O. Pindall, for the appellant.

F. M. Rogers, for the appellee.

¹⁷⁷ BATTLE, J. J. S. Ross brought an action before a justice of the peace of Desha county against the Desha levee board, to recover the value of eight hogs alleged to have been killed by and in pursuance of the order of the defendant, and to be of the value of sixty-eight dollars and ten cents. In trials before the justice of the peace, and in the Desha circuit court on appeal, the defendant recovered judgment, and the plaintiff appealed to this court.

The defense of appellee was based upon the act of the General Assembly of the state of Arkansas in the following words and figures:

¹⁷⁸ "Section 1. It is hereby made unlawful to permit the running at large of hogs on the public levees in the Desha Levee District in Desha County.

"Section 2. The owner of any hogs who permits the same to run at large on the levees mentioned in section 1 of this act, or places his hogs on any of said levees in pens or other inclosures, is hereby declared to be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than \$10, and each day that said hogs are permitted to run on said levees or are kept thereon shall constitute a separate offense.

"Section 3. In any suit, civil or criminal, for the killing or taking of any hogs within the territory of said levee district, the plaintiff or prosecution shall allege or prove that said hog or hogs were not killed or taken on any of the public levees in said levee district or within one hundred feet of the levee base of said levee, and on failure of such allegation and proof verdict shall be for the defendant": Act of March 30, 1903.

According to the act and the evidence adduced in the trials, appellant was not entitled to recover. The question in the case is, Is the act constitutional?

The object of the act was to protect the public levees in the Desha levee district against the rooting of hogs. As many as two acts were passed for that purpose before the act copied in this opinion was enacted. The first act made it unlawful for hogs to run at large upon the levees in said district, and provided that any hogs found running at large on such levees may be taken up, impounded and sold, unless redeemed by the owner: Acts 1893, p. 326. The second, an act entitled "An act to protect the public levees in Chicot and Desha counties," approved February 28, 1895, after reciting that these

levees are greatly injured, weakened and their safety endangered by hogs rooting into the levees, prohibited their running at large without rings in their noses, so put in as to effectually prevent them from rooting, and provided that hogs found running at large on or within one mile of said levees, without being properly ringed, may be killed, and that the owner knowingly permitting such hogs to so run within one mile of such levees, without being properly ringed, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding ten dollars ¹⁷⁹ for each offense: Acts 1895, p. 25. Finally, on the 30th of March, 1903, the act involved in this action was passed. The object of all these acts was to protect the levees against the well-known proclivities of hogs to root and great liability of the levees to be weakened and broken in consequence thereof in times of great floods, and the disastrous consequences following. To accomplish this purpose, the last act in effect makes the running at large of hogs upon the levees or within one hundred feet of their base a nuisance, subject to be abated by the killing of the hogs. Within these forbidden limits it was deemed dangerous to the safety of the levees to permit the hogs to wander, made so by their irresistible and unceasing inclination to root whenever an opportunity is afforded; and it was deemed necessary to impose the penalty in order to compel the owner to keep them out of such limits.

In *Sentell v. New Orleans etc. R. R. Co.*, 166 U. S. 698, 17 Sup. Ct. Rep. 693, 41 L. ed. 1169, it is said: "That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its object the welfare and comfort of the citizens. For instance, meats, fruits and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in the times of epidemics, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or to stay a general conflagration, and that, too, without recourse against such authorities for the trespass. . . . Other instances of this are found in the power to kill

diseased cattle, to destroy obscene books or pictures, or gambling instruments; and in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385, it was held to be within the power of the state to order the summary destruction of fishing nets the use of which was likely to result in the extinction of valuable fisheries within the waters of the state."

In this state it has been held that liquor kept for sale in a ¹⁸⁰ district in which the sale of it is prohibited can be seized under an act of the legislature and destroyed without compensation: *Ferguson v. Josey*, 70 Ark. 94, 66 S. W. 345; *Kirkland v. State*, 72 Ark. 171, 105 Am. St. Rep. 25, 78 S. W. 770. In *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S. W. 257, this court held that "a statute making it the duty of circuit judges, etc., on information given, or on their knowledge, or when they have reasonable grounds to suspect that the law is being violated by the operation of gaming devices, to issue their warrant to some peace officer directing him to search for and destroy gaming-tables or devices, authorizes the summary destruction of those tables and devices only that are made and kept solely for the purpose of gambling, and that can be used for no other purpose, and the act is not unconstitutional as depriving the owner of his property without due process of law."

But it is said that the act in question authorizes the destruction of the property of appellant without notice, judicial proceedings, an opportunity to be heard, or process of law, and is therefore unconstitutional. This does not necessarily follow. In *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 1076, the court held that a statute of New York which provides "that nets set or maintained upon waters of the state, or on the shores or islands in such waters in violation of the statutes of the state enacted for the protection of fish, may be summarily destroyed by any person, and that it shall be the duty of certain officers to abate, remove, and forthwith destroy them, and that no action for damages shall lie or be maintained against any person for or on account of such seizure or destruction, is a lawful exercise of the police power of the state, and does not deprive the citizen of his property without due process of law, in violation of the provisions of the constitution of the United States." In that case the court said: "Where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to a summary abatement. In-

stances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books and pictures, or instruments which can be only used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good ¹⁸¹ deal must be left to its discretion in that regard; and if the object to be accomplished is conducive to the public interest, it may exercise a large liberty of choice in the means employed."

Again it says: "The value of the nets in question was but fifteen dollars apiece. The costs of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation."

We therefore conclude that when the state has the power to provide for the destruction of property it may authorize the same to be done summarily in cases when the property is of no great value and the emergency is such as not to admit of the delay essential to judicial inquiry and consideration, or the circumstances and conditions are such as to render regular judicial proceedings for its condemnation impracticable: *Sentell v. New Orleans etc. R. R. Co.*, 166 U. S. 698, 17 Sup. Ct. Rep. 693, 41 L. ed. 1169.

We think that the act properly authorizes the summary destruction of the hogs. Had it done otherwise, it probably would have been of but little efficacy. The owner of hogs is not deprived by it of relief except in cases in which his hogs are authorized to be killed.

Judgment affirmed.

Constitutionality of Statutes authorizing the summary destruction of gambling apparatus (*Woods v. Cottrell*, 55 W. Va. 476, 104 Am. St. Rep. 1004, and cases cited in the cross-reference note thereto), and of fishing or hunting apparatus used in violation of the law (*State v. French*, 71 Ohio St. 186, 104 Am. St. Rep. 770; *McConnell v. McKillip*, 71 Neb. 712, 115 Am. St. Rep. 614), has generally been upheld. And some courts have even upheld statutes authorizing the summary destruction of unlicensed dogs: See the note to *Armstrong v. State*, 90 Am. St. Rep. 215.

STATE v. SOWARD.

[83 Ark. 264, 103 S. W. 741.]

LARCENY.—Dogs are subjects of larceny. (p. 139.)

William F. Kirby, attorney general, and C. F. Huff, for the appellant.

No counsel marked for the appellee.

265 **BATTLE, J.** The prosecuting attorney of the seventh judicial circuit of the state of Arkansas filed an information before a justice of the peace of Garland county, in this state, in which he accused Guy Soward of unlawfully, willfully, maliciously and wantonly killing a dog, the property of C. Floyd Huff, on the twenty-fifth day of June, 1905, in such county, against the peace and dignity of the state of Arkansas. The defendant was tried and convicted before a justice of the peace, and appealed to the circuit court, where he filed a demurrer to the information, which the court sustained, and the state appealed.

The information was based upon section 1893 of Kirby's Digest, which is as follows: "If any person shall willfully, maliciously or wantonly, by any means whatsoever, kill, maim or wound any animal of another, with or without malice toward the owner of the animal, which it is made larceny to steal, he shall, on conviction, be punished by a fine of not less than twenty nor more than one hundred dollars, or by imprisonment in the county jail for a period of not less than ten or more than sixty days, or by both such fine and imprisonment," etc.

The question is, Is the dog subject to larceny?

The statutes of this state provide: "Larceny is the felonious stealing, taking and carrying, riding or driving away the personal property of another. Larceny shall embrace every

theft which unlawfully deprives another of his money or other personal property, or those means and muniments by which the right and title to property, real or personal, may be ascertained. The felonious taking and carrying away from the possession, actual or constructive, or custody of another any bank note, bond, bill, note, receipt or any instrument of writing whatever, although not herein specified or named, of value to the owner, shall be deemed larceny": Kirby's Digest, secs. 1821-1823.

²⁰⁶ The statutes increase the subjects of larceny and change its meaning. At common law, larceny is defined to be "the felonious taking and carrying away of the personal goods of another." Yet muniments of title, choses in action, as bonds, bills, notes, etc., were not subject to larceny within this definition: 1 Bishop's New Criminal Law, sec. 578; 2 Bishop's New Criminal Law, sec. 770.

Under statutes upon larceny similar to the statutes of this state, dogs have been held to be the subject of larceny: *Mullaly v. People*, 86 N. Y. 365; *State v. Brown*, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81.

In *Mullaly v. People*, 86 N. Y. 365, Mr. Justice Earl, delivering the opinion of the court, said: "At common law the crime of larceny could not be committed by feloniously taking and carrying away a dog. . . . And yet dogs were so far regarded as property that an action of trover could be brought for their conversion, and they would pass as assets to the executor or administrator of a deceased owner.

"The reason generally assigned by common-law writers for this rule as to stealing dogs is the baseness of their nature and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history, and the faithful St. Bernards which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travelers, the claim that the nature of a dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent.

"In nearly every household in the land can be found chattels kept for the mere whim of the owner, a source of solace after serious labor, exercising a refining and elevating influence, and yet they are as much under the protection of the laws as chattels purely useful and absolutely essential.

“This common-law rule was extremely technical, and can scarcely be said to have had a sound basis to rest on. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal any animals of less account than dogs. . . .

“One reason hinted by Lord Coke for holding that it was not larceny to steal dogs was that it was not fit ²⁶⁷ that ‘a person should die for them’; and yet those ancient lawgivers thought it not unfit that a person should die for stealing a tame hawk or falcon.

“The artificial reasoning upon which these laws were based is wholly inapplicable to modern society. *Tempora mutantur et leges mutantur in illis*. Large amounts of money are now invested in dogs, and they are largely the subject of trade and traffic. In many ways they are put in useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property.”

Judge Blackstone said: “But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitae naturae*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may be committed; and also of the flesh of such as are either *domitae* or *ferae naturae*, when killed. As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny”: 4 Blackstone’s Commentaries, 236.

The reasons why dogs were not subjects of larceny at common law do not prevail in this state; and the common law upon that subject is not in force. In *Haywood v. State*, 41 Ark. 479, the defendant was indicted for stealing a mocking bird. The court held that it, though it did not serve for food, and is kept for pleasure, and is chiefly prized as a songster, was, under the statutes of this state, a subject of larceny. The reason assigned was as follows: “The reclaimed mocking bird in question was no doubt personal property. The owner could have brought trespass against the thief, who invaded her portico at night, and deprived her of the possession of her songster which she prized above price; and she could have

maintained replevin against the person to whom he sold it, had he refused to surrender it to her."

So dogs have been repeatedly held by this court to be personal property, for the negligent killing of which by a train ²⁰⁸ a railroad company is liable: *St. Louis etc. R. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; *St. Louis etc. R. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901. They are possessed of many elements of value and utility to the human race—the most valuable, "ranking among the noblest representatives of the animal kingdom, and being justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection and above all for their natural companionship with man," being true and faithful to their masters under all circumstances.

We conclude that dogs are subjects of larceny.

The judgment of the circuit court is reversed and the cause is remanded, with direction to the court to overrule the demurrer to the information and for other proceedings.

Larceny of Dogs is discussed in the note to *People v. Miller*, 88 Am. St. Rep. 588. Property in dogs and the remedies for its enforcement are considered in the notes to *Hamby v. Samson*, 67 Am. St. Rep. 288; *Armstrong v. Brown*, 90 Am. St. Rep. 214.

LUXORA v. JONESBORO, LAKE CITY AND EASTERN RAILROAD COMPANY.

[83 Ark. 275, 103 S. W. 605.]

MUNICIPAL CORPORATION—Bonus to Railroad.—An appropriation of a sum of money by a town council to induce a railroad company to build its road into the municipality and establish a depot therein is void, under a constitutional provision that no municipal corporation shall appropriate money for, or loan its credit to, or become a stockholder in, any corporation, and cannot be ratified by an acceptance of benefits thereunder by the town. (pp. 140, 141.)

MUNICIPAL CORPORATION—Recovery of Money Illegally Paid to Railroad.—A municipal corporation may recover money unlawfully appropriated and paid by its officers to a railroad company as an inducement to build its road into the municipality. (p. 141.)

W. J. Lamb, for the appellant.

E. F. Brown and W. J. Driver, for the appellee.

276 McCULLOCH, J. The town council of the incorporated town of Luxora, as an inducement to the Jonesboro, Lake City and Eastern Railroad Company to build its road into the town and establish a depot therein, by ordinance appropriated the sum of one thousand dollars to be paid to said company on condition that it should execute a bond as a guaranty that it would perform the conditions of said ordinance.

A warrant was drawn on the treasurer of the town for said amount payable to the railroad company, the indemnity bond was executed, and the money paid over to the company on the **277** warrant, and the railroad company complied with the terms of the ordinance by building its road into the town.

The town instituted this action at law to recover the money paid to the railroad company.

It must be conceded that the appropriation of money by the town council for the purpose named was in direct conflict with the constitution of the state which provides that "no county, city or town or other municipal corporation shall become a stockholder in any company, association or corporation or appropriate money for or loan its credit to any corporation, association, institution or individual": Const. 1874, sec. 5, art. 12; *Russell v. Tate*, 52 Ark. 541, 20 Am. St. Rep. 193, 13 S. W. 130, 7 L. R. A. 180; *Newport v. Batesville & B. Ry. Co.*, 58 Ark. 270, 24 S. W. 427.

The ordinance was absolutely void, and could not be ratified by acceptance of benefit thereunder by the town, as it was concerning a matter entirely beyond the scope of corporate power: *Newport v. Batesville & B. Ry. Co.*, 58 Ark. 270, 24 S. W. 427. It is only where the power is exceeded in the method of its exercise, or where the power has been exercised by some unauthorized officer or agent, that a public corporation can ratify the unauthorized act: *Book v. Polk*, 81 Ark. 244, 98 S. W. 1049; *Texarkana v. Friedell*, 82 Ark. 531, 102 S. W. 374; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Dillon on Municipal Corporations*, 4th ed., sec. 463; 20 Am. & Eng. Ency. of Law, p. 1181.

The only remaining question is whether the municipal corporation can recover back the money unlawfully paid out.

As we have already said, the appropriation of the money by the officers of the town was unauthorized and unlawful, and the municipality could not, and did not, by acceptance of

whatever benefit accrued by building the railroad into the town, ratify the act. It is not estopped to deny the validity of the appropriation of funds by the officers. That being true, there can be no principle involved which forbids the recovery of the money unlawfully paid out by the officers of the town and received by the railroad company. We find the law on this subject to be correctly stated in a similar case by the supreme court of Minnesota as follows: "As a general rule, when an individual or private corporation pays money voluntarily with full knowledge of the facts, and without fraud or mistake, it cannot be recovered back, though there was no obligation to pay. To give effect to ²⁷⁸ the payment, however, it must be the act of the individual or corporation; and in this case the payment was not the act of the corporation. It had no authority to make it; no one of the officers, nor all of them together, had authority to make it. The case stands in law as it would had some person, not connected with the city government, taken the money from its treasury and paid it to defendants. It may be different in a case where the payment is for a legitimate purpose, within the power conferred on the municipal corporation, and is made by an officer, or upon the direction of an officer, who has authority to determine whether some condition precedent to the authority of the paying officer to pay has been complied with. As the corporation had no authority to pay the money, the payment was not a corporate act, and consequently there is no basis for the doctrine of voluntary payment": *City of Chaska v. Hedman*, 53 Minn. 525, 55 S. W. 737.

The plaintiff's remedy at law for the recovery of the money illegally paid was complete, and the case should not have been transferred to equity. This was done on the defendant's motion and over the plaintiff's objection.

Reversed and remanded, with directions to remand the case to the circuit court for further proceedings not inconsistent with this opinion.

A City has the Right to appropriate money to a committee of citizens appointed by a chamber of commerce and ratified by the city authorities to defray the expenses of a survey for a ship canal and to secure information as to the benefit which would be derived by the city from the canal, although the constitution forbids municipalities to appropriate money or loan their credit to any corporation, association, institution, or individual: Commonwealth v. Pittsburg, 183 Pa. 202, 63 Am. St. Rep. 752.

Money Illegally Paid Out by City Officials may be recovered back by or for the municipality: *Stone v. Bevans*, 88 Minn. 127, 97 Am. St. Rep. 506; *Land etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915; note to *New Orleans etc. Co. v. Louisiana etc. Co.*, 94 Am. St. Rep. 424.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAIL-
WAY COMPANY v. MOORE.

[83 Ark. 377, 103 S. W. 1136.]

ADVERSE Constructive Possession.—A person who takes actual possession of one of two adjoining tracts of land under a deed conveying both does not acquire constructive possession of the other, if the actual title to the two is in different persons. (p. 143.)

T. M. Mehaffy and J. E. Williams, for the appellant.

J. N. Rachels, for the appellee.

377 RIDDICK, J. This action was brought by the St. Louis, Iron Mountain and Southern Railway Company to quiet its title to the following forty-acre tract of land, to wit: The S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 13, T. 7 N., R. 7 west, lying in White county, Arkansas.

The defendant appeared, and denied title of plaintiff, and set up adverse possession for more than seven years. The evidence showed that the railway company held a patent from the United States conveying to the company the land in controversy.

The agreed statement of facts shows that one William Old died in 1879 in possession of an improvement on land in section 13 and in the southwest quarter of section 14; that in a proceeding to partition this land formerly held by Old the court ordered it sold, and by some oversight perhaps included the S. ³⁷⁸ W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 14 in the order of sale, that being the land in controversy. The land owned by Old, together with the land in controversy, was sold and conveyed to one Stayton under this decree. Stayton and those holding under him have claimed the land under this conveyance since 1881, and have occasionally paid taxes on it, the railroad paying most of the time. The defendant holds under Stayton. He and those under whom he holds have had actual possession of the land originally improved by Old, but no actual possession of any part of the tract now claimed by plaintiff.

The chancellor was of the opinion that under the agreed statement of facts the defendant was now the owner of the land, and he therefore dismissed the complaint for want of equity.

We have set out so much of the facts as we deem necessary. This court has recently held that there can be no constructive adverse possession of land against the owner when there is no actual possession of any part of his land: *Haggart v. Ranney*, 73 Ark. 344, 84 S. W. 703. When one takes possession of one of two adjoining tracts of land under a deed conveying both tracts to him, if the actual title to the two tracts are in different persons, his actual possession of one tract will not give constructive possession of the other so as to oust the owner of that tract. The reason for this is that in such a case the possession of one tract is no notice to the owner of the other tract that his land is claimed adversely. If the law were otherwise, one by buying a small tract and taking a deed conveying the adjacent unimproved lands with the tract bought might, by taking possession of the tract bought, become constructively in the possession of the land without any visible act to notify the owners thereof of such adverse claim.

As there was no actual possession of any part of plaintiff's land by defendant or those under whom he holds, there was as to plaintiff no constructive possession thereof. Of course, had defendant and those under whom he held paid the taxes on these lands continuously for over seven years before the commencement of this action, they might have acquired title under the seven-year tax payment statute, for this would have notified ³⁷⁹ the owner of the adverse claim, but that was not done. And the facts here are not sufficient to bar the action of the plaintiff. We are therefore of the opinion that the land belongs to plaintiff, and that its title should be quieted, and that a decree should be entered in favor of defendant for all taxes paid by himself or those under whom he holds.

Judgment reversed and cause remanded for further proceedings.

The Actual Adverse Possession of a portion of a tract of land under color of title draws to it the constructive possession of the entire tract: See the note to *Power v. Kitching*, 88 Am. St. Rep. 703; *Seals v. Williams*, 80 Miss. 234, 92 Am. St. Rep. 601. As to whether this rule applies where the tract embraced under the muniment of title consists of several lots or tracts, see *Woods v. Montevallo etc. Co.*, 84 Ala. 560, 5 Am. St. Rep. 393; *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800.

MAIN v. JARRETT.

[83 Ark. 426, 104 S. W. 163.]

SALE.—The Delivery of Goods to a Carrier to be transported to the buyer, according to the contract of sale, is a delivery to the buyer, so that their subsequent loss is his. (p. 144.)

A BILL OF LADING Written in Pencil is valid. (p. 144.)

W. G. Dinning, for the appellants.

John I. Moore, for the appellees.

427 **BATTLE**, J. W. F. Main & Company sued W. B. Jarrett and others for one hundred and ninety-one dollars and sixty cents, the amount due them for goods sold. A part of the goods was a showcase. According to the terms of the contract the goods were to become the property of the defendants upon the delivery of the same to a transportation company at Iowa City, in the state of Iowa, consigned to the defendants. The controversy in this case is as to the delivery of the showcase.

M. H. Taylor testified that plaintiffs delivered this showcase to the transportation company for the defendants, consigned to them, and made a part of his testimony the bill of lading given for the same. W. B. Jarrett testified that the showcase was never received by the defendants; that the bill of lading for showcase filed with the deposition of Taylor is a printed bill of lading with blanks for articles shipped filled with pencil in a handwriting different from the signature of the party signing as agent for the transportation company, who signed with an indelible pencil; that the defendants had received a letter from plaintiffs saying that a bill of lading was inclosed, but that was not the case, and that they never made request for a duplicate bill of lading. There was no evidence that the bill of lading had been altered, there being no interlineations or erasures.

The jury returned a verdict, and the court rendered a judgment in favor of the defendants, and plaintiffs appealed.

The uncontradicted evidence shows that the showcase was delivered to the appellees. The delivery to the transportation company for them according to the contract was a delivery to them, and the subsequent loss was their loss. The bill of lading, although written in pencil, was valid (1 Daniel on Nego-

tiable Instruments, 5th ed., sec. 74, and cases cited), and was evidence ⁴²⁸ of that fact. The failure of appellees to receive the showcase does not show that it was not delivered; that is not at all inconsistent with the delivery.

Reverse and remand for a new trial.

The Delivery of Goods by a Vendor to a Carrier to be shipped to the vendee is usually deemed equivalent to a delivery to the vendee: Scharff v. Meyer, 133 Mo. 428, 54 Am. St. Rep. 672; Commonwealth v. Fleming, 130 Pa. 138, 17 Am. St. Rep. 763; Dyer v. Great Northern Ry. Co., 51 Minn. 345, 38 Am. St. Rep. 506. Compare Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831.

WESTERN UNION TELEGRAPH COMPANY v. SHENEP.

[83 Ark. 476, 104 S. W. 154.]

TELEGRAPH COMPANIES—Mental Anguish.—Anguish over imaginary situations, worry and anxiety over business matters, inconvenience and annoyance over the affairs of life, do not amount to mental anguish as a recoverable element against telegraph companies for negligence in the transmission of messages. Such element is limited to social and personal matters, as contradistinguished from business transactions, and contemplates suffering in mind over the real ills, sorrows and griefs of life, and such suffering as would reasonably be contemplated to flow from the failure to acquaint the person with the tidings sought to be conveyed. (p. 148.)

G. H. Fearons and Rose, Hemingway, Cantrell & Loughborough, for the appellant.

J. M. Vineyard and John I. Moore, for the appellee.

⁴⁷⁶ HILL, C. J. Shenep, a policeman in Helena, sent this telegram to his daughter in law, Mrs. Mattie Shenep, at Bigbee, Mississippi: "I will ⁴⁷⁷ be there to-night. Be ready to come back on next train. James Shenep." He paid for the transmission of the telegram to Amory, and also for transmission from Amory to Bigbee, which was to be by telephone. The appellant negligently failed to deliver the message until 10 o'clock the following day. Shenep arrived at Bigbee in the night-time, and, failing to find his daughter, became alarmed, and alleged that he suffered mental anguish as well as bodily inconvenience, and was forced to spend the night without food or shelter, on an unprotected platform, and that it was cold

and rainy. Bigbee was but a short distance, probably a half a mile, from the station. Shenep had been there once before, but was not familiar with the surroundings. His daughter in law was the mother of an infant five weeks old, and Mr. Shenep was uneasy and anxious and disturbed because of her nonappearance pursuant to the request in his telegram.

Her testimony was not taken, but as she returned with her father in law the next day—one day late—it may be assumed that she would have met him pursuant to his telegram had she received it.

Mr. Shenep told the operator that it was important that the message be sent without delay; that he had only one day's leave of absence, and at the point he was to meet his daughter in law there was about an hour and a half between trains; and that the message would have to be sent promptly so that he could return on the next train.

In addition to the mental and physical annoyance to which he was subjected, he was permitted to testify that he was also worried because he thought that he might probably be discharged from his position for overstaying his leave of absence, which was for only one day. He admitted that there was no deduction made in his wages by reason of his absence. There is no evidence that he suffered any pecuniary loss.

Among other instructions, the court gave this, which presents the issue which was sent to the jury: "So the plaintiff is required to prove by a fair preponderance of the evidence that he placed in the hands of the operator, at the city of Helena, Arkansas, a telegram to be delivered at a point in Mississippi, and that, through the negligence of its ⁴⁷⁸ officers, the telegram was not promptly delivered, and by reason of that he suffered damages. The damages will be subject to proof, so far as compensatory damages are concerned, but under the laws of this state he will be entitled to recover further damages for mental anguish, and for pain and suffering occasioned by the nondelivery of the telegram, if any be suffered."

The jury returned a verdict for one hundred and seventy-five dollars against the telegraph company, and it has appealed.

⁴⁷⁹ The supreme court of South Carolina, in the case of *Lewis v. Western Union Tel. Co.*, 57 S. C. 325, 35 S. E. 556, took the same position in regard to mental pain and anguish that this court took in *Peay v. Western Union Tel. Co.*, 64

Ark. 538, 43 S. W. 965, 39 L. R. A. 463. Thereafter, the legislature of South Carolina (as did the legislature of Arkansas) passed a statute making mental anguish a recoverable element. The South Carolina statute is practically the same as the Arkansas statute.

In *Capers v. Western Union Tel. Co.*, 71 S. C. 29, 50 S. E. 537, the South Carolina court said: "When the statute was passed, wherever in text-book or judicial utterance 'mental anguish' was recognized as a ground of action against a telegraph company, the term was limited to apply to social and personal matters, and not extended to business affairs. This was the scope and limitation of the legal meaning of the term, and there is the strongest presumption that the General Assembly intended the term to have the same meaning and limitation in this state."

This court recently held that while it was not bound to adopt the mental anguish doctrine that prevailed in any one state, nor accept inconsistencies in the judicial construction of that doctrine, yet it must turn to the courts of the states where that doctrine has prevailed by judicial construction in order to determine the full force and effect of the statute establishing that doctrine in this state: *Western Union Tel. Co. v. Hollingsworth*, 83 Ark. 39, ante, p. 105, 102 S. W. 681.

A few cases from the states where the mental anguish element of damages prevails will illustrate its inapplicability to the facts here.

In North Carolina a message from mother to son directing him to "come at once" was delayed in transmission, so that the son missed the first train that would have carried him to his ⁴⁸⁰ mother, and he walked nine miles, and was very uneasy and worried about her condition. The court said: "His mother was not dead, nor at the point of death. He knew that because her name was signed to the dispatch. It was his own misapprehension which caused him any uneasiness, and not the negligence and delay of the defendant. He was not deprived by such delay of the opportunity of seeing his mother, who, indeed, is still alive. . . . But if the plaintiff suffered any mental anguish in this case, it was not caused by the negligence of the defendant": *Bowers v. Western Union Tel. Co.*, 135 N. C. 504, 47 S. E. 597.

The Texas court held, where there was a negligent failure to deliver a message correctly, whereby a student lost a position for which he was negotiating, that a failure of the

student to receive benefit from his studies because of worry over the loss of the position was too remote to properly form an element of recovery: *Western Union Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584.

In *Western Union Tel. Co. v. Reed* (Tex. Civ. App.), 84 S. W. 296, the plaintiff was worried and nervous because she did not know whether the funeral of her sister was postponed, owing to negligent failure to deliver a telegram. She was not deprived of the privilege of attending the funeral—in fact did attend it; but the anxiety she experienced was from uncertainty as to whether she could attend it. This annoyance and worry was held not to be mental anguish within the meaning of that term.

A mother sued a telegraph company for negligently failing to transmit money to her son, an inexperienced youth in a distant state, and alleged mental anguish over the son's embarrassing situation there without money. The court said: "The fact that a loving mother, in the dark hours of midnight, may conjure up a thousand forebodings of evil to her distant boy, while he is in no real danger even of losing a single hour's repose, may furnish trouble enough to her; yet it gives no solid basis for damages in a practical business transaction": *Ricketts v. Western Union Tel. Co.*, 10 Tex. Civ. App. 226, 30 S. W. 1105.

The inexperienced son who did not receive the money his mother sent suffered mortification and distress of mind owing to his inability to pay his board in a strange place, causing him, as he thought, to be looked on with suspicion. The court held ⁴⁸¹ there could be no recovery for his wounded sensibility: *De Voegler v. Western Union Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107.

Mental suffering over supposititious or imaginary conditions is not a recoverable element: *Western Union Tel. Co. v. Hollingsworth*, 83 Ark. 39, ante, p. 105, 102 S. W. 681; *Jones on Telegraph Companies*, sec. 579; 3 *Sutherland on Damages*, 975.

Illustrations could be multiplied, but these are sufficient to show that anguish over imaginary situations, worry and anxiety over business matters, inconvenience and annoyance over the ordinary affairs of life, do not amount to mental anguish as a recoverable element of damage. Such element is limited to social and personal matters, as contradistinguished from business transactions, and contemplates suffering in

mind over the real ills, sorrows and griefs of life, and such suffering as would reasonably be contemplated to flow from the failure to acquaint the person with the tidings sought to be conveyed.

The application of these principles here shows that it was error to submit mental pain and suffering as a recoverable element.

The plaintiff would be entitled to recover nominal damages in any event, and such actual damages as he might show directly flowed from the failure to promptly deliver the message, and as to what damages would be proximately resultant from such failure the following cases may be profitably consulted: *Western Union Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169; *Yazoo etc. Ry. Co. v. Foster* (Miss.), 23 South. 581; *Stafford v. Western Union Tel. Co.*, 73 Fed. 273.

Reversed and remanded.

The Right to Recover Damages Against Telegraph Companies for mental anguish due to their negligence in the transmission of messages is considered in the recent note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 305.

INDUSTRIAL MUTUAL INDEMNITY COMPANY v. THOMPSON.

[83 Ark. 575, 104 S. W. 200.]

INSURANCE—Inconsistent Position on Appeal.—When an action to recover on an insurance contract is tried on the theory that the policy has been forfeited but the forfeiture waived, the issue of nonforfeiture cannot be made on appeal. (p. 154.)

INSURANCE—Waiver of Forfeiture by Agent.—A superintendent of agencies authorized to settle and adjust claims against his company has authority to waive a forfeiture for nonpayment of premiums, notwithstanding an express condition of the policy that a waiver can be effected only in writing signed by the president or secretary. (p. 154.)

INSURANCE—Waiver of Forfeiture by Making Settlement.—When the representative of an insurance company settles a claim by paying a part of the loss, he thereby waives a prior forfeiture. (p. 155.)

INSURANCE—Fraudulent Settlement of Claim.—A receipt fraudulently procured from an insured in full acquittance of her claim does not bind her. (p. 156.)

INSURANCE—Fraudulent Settlement—Return of Amount Received.—Where an insurance company has procured the settlement

of a claim through fraud, the insured is not required to tender the amount she has received under such settlement as a prerequisite to a suit on her policy. The jury may make the proper deduction in their verdict. (p. 156.)

Jacob Fink, for the appellant.

W. G. Dinning, for the appellee.

⁵⁷⁶ WOOD, J. Appellee's mother, Margaret Johnson, was insured with appellant company for two hundred and ten dollars, provided that at the time of her death all dues and assessments due the company were paid. The complaint of appellee alleged that Mrs. Johnson died on March 18, 1906; that all dues and assessments were fully paid; that appellant had paid twenty-eight dollars and fifty cents, and refused to pay the balance. Judgment was asked for one hundred and eighty-one dollars and fifty cents. Appellant answered and admitted that, in consideration of weekly payments of fifty cents to be paid appellant on or before each Monday during the continuance of the contract, it had insured Mrs. Johnson in the sum claimed. Appellant admitted that appellee was the beneficiary, and admitted the death of the assured. Appellant set up in defense that the policy provided that, "if any payment shall be in arrears more than four weeks, the policy shall become void, and the payments already made be forfeited to the company." It was also provided that the condition which avoids the policy shall not be waived by the acceptance of payments in arrears. Appellant alleged that Mrs. Johnson, at the time of her death, had failed to make weekly payments for seven weeks, from January 29, 1906, to March 14, 1906, when appellee sent to an agent of appellant the sum of four dollars. Appellant also set up a written receipt signed by appellee and delivered to appellant acquitting appellant of all further liability.

Appellee replied to the answer, alleging that she was an ignorant negro woman, and knew nothing of the rules governing transactions set forth in the receipt which appellant holds, and averring that appellant, well knowing her ignorance of such transactions, represented to her that the policy had lapsed and was void because her mother had failed for more than four weeks to make payments of dues; that appellant advised her that it would be for her best interest to accept the twenty-eight dollars and execute the receipt. Appellee further alleged that the representations ⁵⁷⁷ were made by

the general agent of the company for the fraudulent purpose of deceiving and depriving appellee of the benefit of the proceeds of the policy; that the representations were false and known to be false at the time they were made by the agent who made them; and that she, being ignorant of the facts and believing that the agent was advising her for her best interests, acted upon such advice in signing the receipt. She alleged that the receipt, by reason of the false and fraudulent representation, coercion and undue influence of appellant in causing her to execute same, was without consideration as an acquittance for a larger sum than twenty-eight dollars, and did not bar appellee's right to recover the balance claimed.

The appellee proved that her mother had a policy in appellant company, that appellee was the beneficiary. Appellee paid the dues for her mother. She lived at Marvel, in Phillips county, and would pay dues to the agent McCain when he came out from Helena to collect same. That she paid in advance sometimes two or three dollars at a time when the agent would come out and ask for it. The last payment she made before the death of her mother was January 29th. Her mother died March 18th. On the 14th of March she received a letter from the agent, McCain, who had been collecting the dues, in which he said that there were such a few out there he wouldn't come any more to collect, and for appellee to send him four dollars, and he further wrote: "I will never allow it to run out." The next day appellee sent the money. She says that McCain said that four dollars were then due.

It was shown the amount received for dues was entered in a book, and that according to this the last payment of dues before the four dollars were sent was on January 29th, when appellee paid fifty cents. Appellee executed to appellant a receipt for twenty-eight dollars "in full settlement of all claims and demands" against appellant arising under the policy sued on. Appellee details the circumstances under which the receipt was executed as follows: "When the agent came, I asked him, 'Is my mamma all right? There is nothing behind now, is there, and you will pay the money, won't you?' And he said, 'Of course, we will pay the money. You come in Saturday, and the money will be in my office.' When I got there he had a great long letter stating that ⁵⁷⁸ my mother was unfinancial, and he told me: 'The best thing you can do is to take what you paid in for your mother, because

you can't get nothing else.' I thought he was telling me the truth about it, is the reason I took it. He advised me as a friend, and said, inasmuch as it was me he would pay the amount I had paid in, said that was the best I could do, and all I could get, and I relied upon his word and signed the paper because I didn't know nothing else to do." Appellee testified that she was a colored woman. The appellant introduced the policy which contained the following conditions:

"3. If any of the statements or warranties herein referred to, and upon which this policy is granted, be not true, or if the conditions of said policy be not in all respects observed, or if this policy shall be in arrears more than four weeks, this policy shall thereupon terminate or become void, all payments paid shall be forfeited to the company except as provided herein, and it is expressly stipulated and agreed that the foregoing provisions, which avoid the policy, in case any payment shall be in arrears more than four weeks, shall not be considered in any respect waived by any act of grace by the company in the acceptance of payments in arrears more than four weeks upon this or any other policy."

"4. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be varied or modified nor any forfeiture waived, except by agreement in writing signed by one of the following officers, namely, the president, vice-president, secretary, whose authority will not be delegated; no other person has or will be given authority. Therefore, agents, which term includes superintendents and assistant superintendents, are not authorized, and have no power to make, alter, or discharge contracts or waive forfeitures or receive payments on policies in arrears more than four weeks, or to receipt for same in the receipt-book, and all such arrears given to an agent shall be at the sole risk of those who pay them, and shall not be credited upon the policy, whether entered in the receipt-book or not."

Appellant introduced the receipt-book in which the payments were entered from time to time as they were made, showing that the last payment was made as above mentioned, and containing ⁵⁷⁹ this recital: "Agents are required to call with regularity for the weekly payments, but an omission to do so will not be an excuse for your policy being in arrears. . . . All moneys paid at the time of application for mem-

bership and every subsequent payment must be entered in this book."

Witness Metlock, on behalf of appellee, testified that he was in the employ of appellant from October 26, 1904, to April 20, 1906; that he was the superintendent of agencies, and his duties were also to solicit for business, to collect premiums on same, and to adjust and settle claims. McCain was an employé of the appellant at the same time. He turned over to witness Metlock money received by him from one Florence Thompson or Margaret Johnson as dues and assessments on the policy sued on. This money, all except the four dollars which was collected after the policy had been canceled, was turned over to appellant company to be credited on the policy as dues. He did not turn over the four dollars because that was received after the policy had lapsed, and it was the instructions of appellant to hold such money until official notice was received from the company that same had been received and placed upon the company's books, and in this instance the holder of the policy died before he had forwarded revival application to the company at Little Rock.

The duties of McCain were to solicit for new business and to collect premiums on policies of insurance as long as they were in force, or until the dues were four weeks or more in arrears. The witness in regard to the receipt testified as follows: "On the day of appointment Florence Thompson came to my office, and I told her that I had a letter from the company, and showed her the letter. I further told her the policy on her mother had been canceled for nonpayment of dues, and that the company was not liable in any way under the same, and read to her clause 'four' in the policy, showing her why the company was not liable, etc. She then said that she owed a funeral bill, etc. And that she thought that, if we would give her her money back, she could satisfy the undertaker, etc. I then counted up what had been paid on the policy and gave it to her—twenty-eight dollars in all—explaining to her that the company was donating the amount only, as we owed her nothing. I then read the receipt, which she afterward signed and which is attached ⁵⁸⁰ hereto, to her, and gave same to her to read for herself, and explained fully that she was signing a receipt in full against all claims against the company under her mother's policy. She said she was glad to get twenty-eight dollars, as she realized fully that she was entitled to nothing, and, thanking me for my

kindness, etc., went out. As agent of the company, I received from Florence Thompson a receipt, which I file with my deposition."

The contents of the receipt are set forth. Instruction No. 2, given by the court, was as follows: "You are further instructed that if you find from the evidence in this case that one or more of the defendant's agents made false representations of fact to plaintiff, or used fraud or deceit in inducing her to sign the receipt introduced in evidence, or used undue influence upon her to induce her to sign same, and she, believing that such representations were true, was induced thereby, or by fraud, deceit, or undue influence, to sign same, such receipt will not estop plaintiff from recovering whatever amount be found due her under the terms of the contract of insurance."

582 1. Appellee contends here that the proof does not show that the policy was forfeited on account of the nonpayment of dues. But appellee tried the case in the court below upon the theory that the policy had been forfeited, but that such forfeiture was waived by the act of appellant's agents in receiving the dues after the forfeiture for nonpayment. No issue was made in the court below as to nonforfeiture, and none could be made here.

2. The court instructed the jury at the instance of appellee that if the forfeiture resulted from the nonpayment of dues, and was known to the agent of appellant, and if such agent thereafter received and collected the amount of the dues in arrears, this would constitute a waiver of the forfeiture. The court further instructed that: "If the plaintiff relies for recovery on the defendant waiving the forfeiture on account of the nonpayment of assessments for a longer term than four weeks, the plaintiff must show by a preponderance of the testimony that the defendant authorized said waiver by its agents or ratified the act of its agents in waiving said forfeiture."

The appellant contends that the instructions were erroneous for the reason that the agents who collected and held the money were not authorized, under the terms of the policy, to collect the assessments, and thereby waive a forfeiture after same had occurred, but that they were expressly prohibited from waiving such forfeiture. Appellant contended that a waiver of this kind under the express provisions of the policy could only be effected "in writing signed by either the

president, vice-president or secretary." Appellant asked instructions in conformity with its contention, which the court refused. Appellant relies upon the authority of *Fidelity Mutual Life Ins. Co. v. Bussell*, 75 Ark. 25, 86 S. W. 814, for reversal on the issue of waiver of forfeiture. But in that case the facts were different. The waiver in that case was ⁵⁹³ by a mere local agent, who had only power to solicit insurance and collect premiums. If the waiver in this case had been by McCain, who was a mere local agent with authority to solicit insurance and collect premiums, the analogy would be perfect, and *Fidelity Mutual Life Ins. Co. v. Bussell*, 75 Ark. 25, 86 S. W. 814, would control. But here, after the past-due assessments were received by McCain, he forwarded same to Metlock, who accepted same. He, Metlock, was "the superintendent of agencies." While the duties of that position are not more particularly explained, it indicated far more than mere local power, and, for aught that the proof shows to the contrary, may have embraced the authority and power to superintend agencies whose duty it was to pass upon applications for and to issue policies of insurance. It is a broad term, and, without more definite and specific limitations, may be taken to indicate very general powers. Furthermore, Metlock had power, and it was his duty, to adjust and settle claims. This would certainly include authority to waive a forfeiture. The proof certainly showed that he had authority to adjust and settle claims. For he undertook to settle her entire claim for the sum of twenty-eight dollars and fifty cents, giving her this amount and taking her receipt "in full settlement of all claims and demands against" the company "arising under or by reason of the policy." The receipt itself shows that Metlock had power to waive a forfeiture. For how could he adjust and settle a claim of two hundred and ten dollars, that had been forfeited, for twenty-eight dollars and fifty cents unless he had the power to waive the forfeiture? The very fact that he settled the claim, as he supposed he had done, shows that he had waived the alleged forfeiture. One cannot settle a forfeited claim without waiving the forfeiture. It would involve a contradiction in terms. It is not pretended by appellant that Metlock did not have authority to "adjust and settle claims." This being true, appellant cannot be heard to say that he did not also have authority to waive forfeitures. The instructions should have told the jury that the waiver could only have

been made by an agent acting within the scope of his authority. But, as the uncontroverted proof showed that Metlock was acting within the scope of his authority in making the waiver, the giving of the instructions without the qualification indicated was not prejudicial. The case is ruled on this point rather by the principles announced in *Queen of Arkansas* ⁵⁸⁴ *Fire Ins. Co. v. Cooper-Cryer Co.*, 81 Ark. 160, 98 S. W. 694, than by *Fidelity Mutual Life Ins. Co. v. Bussell*, 75 Ark. 25, 86 S. W. 814.

2. The court was warranted, from the circumstances set forth in the statement of facts, in submitting to the jury the question of whether or not the receipt which appellant obtained from appellee in full acquittance of her claim was a fraud upon her rights. The question as to whether or not the receipt was fraudulently obtained was properly submitted in appellee's instruction No. 2. It was a jury question.

3. The jury having determined, upon evidence sufficient here, that the receipt was fraudulently obtained and therefore void, it was not a prerequisite to the maintenance of appellee's suit that she should have tendered to appellant the amount she had been paid: *St. Louis etc. R. Co. v. Smith*, 82 Ark. 105, 100 S. W. 884, and authorities cited. The jury made a deduction in their verdict of the amount that had been paid. Moreover, the question is raised here for the first time. It could not avail also for that reason.

We find no prejudicial error, and the judgment is therefore affirmed.

The Waiver of Forfeitures by agents of insurance companies contrary to stipulations in policies against waivers except in writing, and then by specified officers of the company, is discussed in the note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 99.

COTNAM v. WISDOM.

[83 Ark. 601, 104 S. W. 164.]

PHYSICIANS—Compensation for Services to Unconscious Patient.—Where surgeons operate upon an unconscious man whom they are called to attend by third persons, and who dies without regaining consciousness, the law implies a contract on his part to pay the reasonable value of their services. (p. 160.)

PHYSICIANS—Compensation for Unsuccessful Operation.—A surgeon who brings to an operation due skill and care earns the reasonable and customary price therefor, whether the outcome be beneficial to the patient or the reverse. (pp. 160, 161.)

PHYSICIANS—Compensation.—The Financial Condition of a patient cannot be taken into consideration in estimating the value of his surgeon's services, if the patient was unconscious when the surgeon was called and never regained consciousness. (p. 161.)

PHYSICIANS—Compensation—Family Relationship.—In an action for services rendered by surgeons on a patient who did not recover, evidence that he was a bachelor and that his estate went to his nieces and nephews is irrelevant on the issue as to the value of the services. (p. 162.)

A claim for surgical attention to A. M. Harrison was allowed against his estate by the probate court. From this allowance the administrator appealed to the circuit court. The evidence disclosed that Harrison was injured in a street-car wreck, and that, while he was unconscious, spectators called a surgeon, who in turn called another surgeon to assist in the case. They found that Harrison was suffering from a fractured skull, and performed on him the operation of trephining. He never recovered consciousness, and lived but a short time after the operation. The claim against his estate was based on these services, and was for two thousand dollars. One of the surgeons testified that this charge was the result of an inquiry into the financial condition of the estate of the decedent. Other evidence was introduced showing that the estate was valued at about eighteen thousand dollars, which would go to collateral heirs. All this testimony was admitted over the administrator's objection.

The court, at the plaintiff's request, gave the jury this instruction:

"1. If you find from the evidence that plaintiffs rendered professional services as physicians and surgeons to the deceased, A. M. Harrison, in a sudden emergency following the deceased's injury in a street-car wreck, in an endeavor to

save his life, then you are instructed that plaintiffs are entitled to recover from the estate of the said A. M. Harrison such sum as you may find from the evidence is a reasonable compensation for the services rendered.

“2. The character and importance of the operation, the responsibility resting upon the surgeon performing the operation, his experience and professional training, and the ability to pay of the person operated upon, are elements to be considered by you in determining what is a reasonable charge for the services performed by plaintiffs in the particular case.”

There was a verdict for six hundred and fifty dollars in favor of the plaintiffs. Defendant appealed.

Mehaffy, Williams & Armistead, for the appellant.

Moore, Smith & Moore, for the appellee.

604 HILL, C. J. The reporter will state the issues and substance of the testimony, and set out instructions 1 and 2 given at instance of appellees, and it will be seen therefrom that instruction 1 amounted to a peremptory instruction to find for the appellees in some amount.

1. The first question is as to the correctness of this instruction. As indicated therein, the facts are that Mr. Harrison, appellant's intestate, was thrown from a street-car, receiving serious injuries which rendered him unconscious, and while in that condition the appellees were notified of the accident and summoned to his assistance by some spectator, and performed a difficult operation in an effort to save his life, but they were unsuccessful, and he died without regaining consciousness. The appellant says: “Harrison was never conscious after his head struck the pavement. He did not, and could not, expressly or impliedly, assent to the action of the appellees. He was without knowledge or will power. However merciful or benevolent may have been the intention of the appellees, a new rule of law, of contract by implication of law, will have to be established by this court in order to sustain the recovery.” Appellant is right in saying that the recovery must be sustained by a contract by implication of law, but is not right in saying that it is a new rule of law, for such contracts are almost as old as the English system of jurisprudence. They are usually called “implied contracts”; more properly, they should be called quasi contracts or constructive

contracts: See 1 Page on Contracts, sec. 14; also 2 Page on Contracts, sec. 771.

⁶⁰⁵ The following excerpts from *Sceva v. True*, 53 N. H. 627, are peculiarly applicable here:

"We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of an accident or disease, may be held liable, in assumpsit, for necessities furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact—no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts and circumstances by the jury—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as a matter of law, that there is a contract and a promise when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

"Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found, either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says that it shall be taken that there was a promise when, in ⁶⁰⁶ point of fact, there was none. Of

course, this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the *obligationes quasi ex contractu* of the civil law, which seem to lie in the region between contracts on the one hand and torts on the other, and to call for the application of a remedy not strictly furnished either by actions *ex contractu* or actions *ex delicto*. The common law supplies no action of duty, as it does of *assumpsit* and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of *assumpsit* where there is no true contract, and no promise to support it."

This subject is fully discussed in Beach on the Modern Law of Contracts, 639 et seq., and 2 Page on Contracts, section 771 et seq. One phase in the law of implied contracts was considered in the case of *Lewis v. Lewis*, 75 Ark. 191, 87 S. W. 134.

In its practical application, it sustains recovery for physicians and nurses who render services for infants, insane persons and drunkards: 2 Page on Contracts, secs. 867, 897, 906. And services rendered by physicians to persons unconscious or helpless by reason of injury or sickness are in the same situation as those rendered to persons incapable of contracting, such as the classes above described: *Raoul v. Newman*, 59 Ga. 408; *Meyer v. Supreme Lodge*, 178 N. Y. 63, 64 L. R. A. 839.

The court was therefore right in giving the instruction in question.

2. The defendant sought to require the plaintiff to prove, in addition to the value of the services, the benefit, if any, derived by the deceased from the operation, and alleges error in the court refusing to so instruct the jury. The court was right in refusing to place this burden upon the physicians. The same question was considered in *Ladd v. Witte*, 116 Wis. 35, 92 N. W. 365, where the court said: "That is not at all the test. So that a surgical operation be conceived and performed with due skill and care, the price to be paid therefor does not depend upon the result. The event so generally lies with the forces of nature that all intelligent men know and understand that the surgeon is not ⁶⁰⁷ responsible therefor. In absence of express agreement, the surgeon, who brings

to such a service due skill and care earns the reasonable and customary price therefor, whether the outcome be beneficial to the patient or the reverse."

3. The court permitted to go to the jury the fact that Mr. Harrison was a bachelor, and that his estate would go to his collateral relatives, and also permitted proof to be made of the value of the estate, which amounted to about eighteen thousand five hundred dollars, including ten thousand dollars from accident and life insurance policies.

There is a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services were rendered, or the financial condition of the person receiving such services. In *Robinson v. Campbell*, 47 Iowa, 625, it was said: "There is no more reason why this charge should be enhanced on account of the ability of the defendants to pay than that the merchant should charge them more for a yard of cloth, or the druggist for filling a prescription, or a laborer for a day's work." On the other hand, see *Haley's Succession*, 50 La. Ann. 840, 24 South. 285, and *Lange v. Kearney*, 4 N. Y. Supp. 14, which was affirmed by the court of appeals, 127 N. Y. 676, 28 N. E. 255, holding that the financial condition of the patient may be considered.

Whatever may be the true principle governing this matter in contracts, the court is of the opinion that the financial condition of a patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires.

In *Morrisett v. Wood*, 123 Ala. 384, 82 Am. St. Rep. 127, 26 South. 307, the court said: "The trial court erred in admitting testimony as to the value of the patient's estate, against the objection of the defendant. The inquiry was as to the value of the professional services rendered by the plaintiff to the defendant's testator, and, as the case was presented below, the amount or value of the latter's estate could shed no legitimate light upon this issue nor aid in its elucidation. The cure or amelioration of disease is as important to a poor man as it is to a rich one, and, prima facie at least, the services rendered the one are of the same value as the same services rendered to the other. If there was a recognized usage obtaining ⁰⁰⁶ in the premises here involved to graduate professional charges with reference to the financial

condition of the person for whom such services are rendered, which had been so long established and so universally acted upon as to have ripened into a custom of such character that it might be considered that these services were rendered and accepted in contemplation of it, there is no hint of it in the evidence."

There was evidence in this case proving that it was customary for physicians to graduate their charges by the ability of the patient to pay, and hence, in regard to that element, this case differs from the Alabama case. But the value of the Alabama decision is the reason given which may admit such evidence, viz., because the custom would render the financial condition of the patient a factor to be contemplated by both parties when the services were rendered and accepted.

The same thought, differently expressed, is found in *Lange v. Kearney*, 4 N. Y. Supp. 14.

This could not apply to a physician called in an emergency by some bystander to attend a stricken man whom he never saw or heard of before; and certainly the unconscious patient could not, in fact or in law, be held to have contemplated what charges the physician might properly bring against him. In order to admit such testimony, it must be assumed that the surgeon and patient each had in contemplation that the means of the patient would be one factor in determining the amount of the charge for the services rendered. While the law may admit such evidence as throwing light upon the contract and indicating what was really in contemplation when it was made, yet a different question is presented when there is no contract to be ascertained or construed, but a mere fiction of law creating a contract where none existed in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered. The services are the same, be the patient prince or pauper, and for them the surgeon is entitled to fair compensation for his time, service and skill. It was, therefore, error to admit this evidence and to instruct the jury in the second instruction that in determining what was a reasonable charge they could consider the "ability to pay of the person operated upon."

609 It was improper to let it go to the jury that Mr. Harrison was a bachelor, and that his estate was left to nieces and nephews. This was relevant to no issue in the case, and its effect might well have been prejudicial. While this verdict is no higher than some of the evidence would justify, yet it is

much higher than some of the other evidence would justify, and hence it is impossible to say that this was a harmless error.

Judgment is reversed and cause remanded.

Justices Battle and Wood concur in sustaining the recovery and in holding that it was error to permit the jury to consider the fact that his estate would go to collateral heirs, but they do not concur in holding that it was error to admit evidence of the value of the estate and instructing that it might be considered in fixing the charge.

A Physician may Recover for His Services, although he was mistaken in his treatment, provided he was not negligent or unskillful: *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668. He does not warrant or insure a successful conclusion of his services: *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; note to *Gillette v. Tucker*, 93 Am. St. Rep. 659. As to whether value of a patient's estate can be taken into consideration in determining the reasonable value of a physician's services, see *Morrissett v. Wood*, 123 Ala. 384, 82 Am. St. Rep. 127.

Ordinarily, a Patient must be Consulted and his consent obtained before a physician has any right to operate on him: *Mohr v. Williams*, 95 Minn. 261, 111 Am. St. Rep. 462.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

UNION COLLECTION COMPANY v. BUCKMAN.

[150 Cal. 159, 88 Pac. 708.]

GAMBLING NOTES.—When the consideration of a promissory note is an indebtedness for money lost at a gambling game in a gambling-house, it is against public policy, and no recovery can be had thereon. (p. 166.)

GAMBLING NOTES.—An Assignee of a Non-negotiable Note given for a gambling debt is in no better a position than the original payee. (pp. 166, 167.)

NEGOTIABLE GAMBLING NOTES—Burden of Proof.—Where an action is brought by an indorsee of a negotiable note, and it is shown that the consideration is illegal, the plaintiff must assume the burden of proving that he took without notice, before maturity, and for value. (p. 167.)

GAMBLING NOTES—Renewals of.—When a non-negotiable note has been given for a gambling debt, like notes given as renewals have no more validity than the original note. (p. 167.)

COMPROMISES of a Doubtful Claim Asserted and Maintained in Good Faith constitute sufficient consideration for a new promise, though it may ultimately be found that the complainant could not have prevailed. (p. 168.)

COMPROMISE of a Pending Action on a Claim Wholly Without Foundation and known by the claimant to be so is not a sufficient consideration for a new promise. (p. 168.)

COMPROMISE of a Pending Action on a Claim Based on an Unlawful Consideration, as, for Instance, a Gambling Debt, is not a sufficient consideration to support a new promise. (pp. 168, 169.)

CONTRACTS, ILLEGAL.—Courts will not Entertain an Action in Affirmance of an illegal contract, though the party against whom relief is sought makes no objection on the ground of the illegality, or expressly waives it. (pp. 168, 169.)

GAMBLING DEBTS.—The Holder of a Non-negotiable Note Given for a Gambling Debt, though he has no notice of the circumstances under which it was given, cannot recover thereon; nor upon any note given in renewal thereof, nor upon any note given in com-

promise of an action founded upon the original note or any renewal thereof. (p. 171.)

PRACTICE.—The Failure to Find upon Certain Issues Made by the Pleadings does not entitle a party to a reversal if other findings show that the judgment must have been against him, even had findings been made in his favor on the other issues. (p. 172.)

J. S. Reis, for the appellant.

William H. Chapman and E. G. Knapp, for the respondent.

¹⁰⁰ **ANGELLOTTI, J.** This action was brought upon two certain instruments in writing, whereby defendant agreed to pay to one Reid, plaintiff's assignor, four hundred and ten dollars and interest. Judgment went for defendant, and plaintiff appeals therefrom, and from an order denying its motion for a new trial.

Defendant in his answer admitted the execution of the instruments, but alleged that they were given without any consideration whatever, and solely for the purpose of evidencing an alleged indebtedness for money lost to one McMahon at a gambling game, for which alleged indebtedness he had given notice to McMahon, which had been transferred to Reid, and in part renewal of which he had executed the instruments in suit. He further alleged that Reid took and held the McMahon notes with full notice of the circumstances under which they were given, and that plaintiff here had the same notice.

Upon the trial, in support of this defense and in response to the prima facie case made by plaintiff, the following facts were shown over the objection and exception of plaintiff:

Defendant, at a gambling-house in San Francisco and in a gambling game participated in by McMahon, who was a winner therein, lost some thirteen hundred dollars, for which amount he then and there, at McMahon's request, gave to McMahon three promissory notes, which notes were non-negotiable by reason of the presence in each of a stipulation for attorney fees in the event of suit. The evidence is sufficient to support the conclusion of the trial court that the original alleged indebtedness to McMahon was for money lost by defendant at this game and won by McMahon. There was no attempt whatever on the part of plaintiff to rebut the evidence of defendant upon this proposition. These notes were transferred to Reid for collection. Reid testified that he did not represent McMahon, but some other undisclosed person, who was the equitable owner of the notes, but this we regard

as immaterial. Reid subsequently brought suit upon one of ¹⁶¹ these notes for five hundred dollars. While this action was pending and ready for trial, defendant claiming that the note therein in suit and the other two notes were given solely to settle a gambling debt, an agreement was entered into between defendant and Reid, whereunder a dismissal of the suit was had and the three notes canceled in consideration of the giving of four notes for two hundred dollars each and interest by defendant to Reid. These notes were also non-negotiable. Upon these notes one hundred dollars only has been paid. Subsequently Reid brought another action upon two of these notes, and this action being at issue and ready for trial, and the defendant pleading therein want of consideration, in consideration of the dropping of the case from the calendar and its indefinite continuance, and ultimate final dismissal, in the event that defendant performed his part of the agreement, defendant executed the instruments in suit, which were also non-negotiable in form, and paid the jury costs. He also, in writing, purported to waive all defenses he might have to the claim of plaintiff, and to ratify the notes he had given.

The findings of the court were in accord with the allegations of the answer.

The questions raised on this appeal are presented by exceptions to the rulings of the trial court in admitting evidence as to the validity of the original notes, and by attacks on certain findings of the court on the ground of insufficiency of evidence to sustain them.

As already stated, the evidence sufficiently supports the conclusion of the trial court that the original notes were given to McMahon by defendant solely to evidence an alleged indebtedness for money lost by defendant to McMahon at a gambling game in a gambling-house. At the outset, therefore, it may be stated that it is clear that under the settled law of this state the consideration for such notes was *contra bonos mores* and unlawful (Civ. Code, secs. 1607, 1667), and that McMahon could not have recovered thereon: *Bryant v. Mead*, 1 Cal. 441; *Gahan v. Neville*, 2 Cal. 81; *Carrier v. Brannan*, 3 Cal. 328; *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746; *Hill v. Kidd*, 43 Cal. 615; *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110.

It is also plain that any assignee of McMahon of said notes could occupy no better position in a suit on the same than

¹⁶² McMahon himself. The notes being non-negotiable, any defense available against McMahon would have been available against any assignee or person claiming under McMahon. Such a contract on the part of the loser to pay the amount of his losses at a gambling game could only be enforced if negotiable in form, and then only by an innocent purchaser before maturity for value.

It is also well settled that even in the case of negotiable paper, where an action is brought by a subsequent holder, when it is shown that the same was obtained from the maker by fraud or duress, or that the consideration therefor was illegal, a prima facie case of notice to such holder is made out, and the burden of proving that he took without notice before maturity and for value is thrown upon him: *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Jordan v. Grover*, 99 Cal. 194, 33 Pac. 889; *Shain v. Goodwin*, 46 Fed. 564. See, also, *Perkins v. Prout*, 47 N. H. 387, 93 Am. Dec. 449, and note. It was said in *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286, quoting from *Parsons on Notes and Bills*, that the reason for this rule is that the presumption is that the original party who has obtained such an instrument, and could not recover upon it, will part with it for the purpose of enabling some third party to recover upon it for his benefit, and, quoting from *Lord Campbell*, that when the defendant has proved fraud or illegality in the original holder, he has raised a prima facie presumption that the plaintiff is agent for that holder. In the absence of such rebutting evidence, the finding must be that the plaintiff in such an action is not a holder without notice and for value.

From what has been said, it is plain that the illegal consideration being made to appear, a recovery on the original notes could not have been had in an action brought by McMahon, or Reid, or Reid's undisclosed equitable owner, or this plaintiff, and that any action thereon would have been without any legal foundation whatever. The same thing is necessarily true as to any notes given solely in renewal or in place of such original notes. Merely repeating a promise based on an illegal consideration cannot give it validity.

Plaintiff, however, relies upon the contention that the compromises of the prior proceedings brought against defendant ¹⁶³ constituted a sufficient legal consideration for the instruments in suit, and barred all inquiry here as to the

nature of the original transaction between defendant and McMahan.

It cannot, of course, be successfully disputed that the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed. This is true whether the claim be in suit or not, but the rule is specially applicable where legal proceedings to enforce the asserted claim have been commenced and are pending and the proceedings are discontinued in pursuance of such compromise: See *Spielberger v. Thompson*, 131 Cal. 55, 63 Pac. 132, 678; *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822; *Rohrbacher v. Aitkin*, 145 Cal. 485, 78 Pac. 1054. As to the effect of a compromise of a pending action, some general language of such nature has been used by some text-writers and courts as would, taken alone, warrant the contention of plaintiff that the compromise of the action in any case constitutes a sufficient consideration for a new promise and is a bar to all inquiry as to the merits of the original claim: See *Beach on Modern Law of Contracts*, sec. 177. Such, undoubtedly, should ordinarily be the effect of a compromise agreement made in good faith of a claim honestly asserted, for it is the policy of the law to discourage litigation and allow the parties to settle their bona fide disputes amicably. An examination of the authorities, however, discloses the fact that it has generally been recognized that to make a compromise of a claim, even though the same be in suit, sufficient to constitute a consideration for a new promise, the claim must not be wholly without foundation and known to the claimant to be so: See 6 Am. & Eng. Ency. of Law, 2d ed., 714; 8 Cyc. 503, 505, 507, 509; 9 Cyc. 346; *Beach on Modern Law of Contracts*, sec. 176; *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150; *Pitkins v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Cruetz v. Heil*, 89 Ky. 429, 12 S. W. 626; *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. 269; *Grandin v. Grandin*, 49 N. J. L. 508, 60 Am. Rep. 642, 9 Atl. 756; *Gould v. Armstrong*, 2 Hall, 290. An examination of the cases cited by Mr. Beach in support of the rule stated by him in section 177 of his *Modern Law of Contracts* shows that in many of those cases ¹⁶⁴ the courts were careful to state that there was no fraud or want of good faith on the part of the plaintiff in the prosecution of the original action which was compromised, while in the other cases the state-

ment sustaining the literal text was purely obiter. In *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822, this court quoted approvingly from Wharton on Contracts, section 533, as follows: "As has been incidentally noticed, a promise to compromise a claim utterly unfounded will not be regarded as a valid consideration. . . . It is otherwise when a suit is brought bona fide on probable cause; and a promise to compromise such suit is a valid consideration, even though the suit should be held to be unfounded."

But whatever may be the law as to cases involving no question of illegality, it is very clear that the rule contended for by plaintiff as to the effect of a compromise of an action can have no application where the claim involved therein was wholly based upon an unlawful, as distinguished from a merely insufficient, consideration.

There is no better settled rule of law than the one to the effect that the courts will not entertain any action in affirmance of an illegal contract. As was said in *Hill v. Kidd*, 43 Cal. 615: "It is equally well settled that no action in affirmance of an illegal contract can be maintained. When parties make such contracts, they must rely upon the good faith of those with whom they deal for their performance, and that failing they are denied all redress": See note to *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 66. This universally acknowledged rule is not based upon any consideration for the party against whom the relief is sought, and who will be benefited by the refusal of the court to grant the same, but upon considerations of sound public policy. As said in *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735, "it is not for the sake of the party who is benefited by the intervention, but for the sake of the law itself," that a court refuses to allow the law and the machinery of the courts to be made use of for the enforcement of illegal contracts, and leaves the parties precisely where it finds them, under the rule expressed in the maxim, "*Ex turpi causa non oritur actio.*" It is, therefore, settled that the failure of the party against whom such relief is sought to make objection upon the ground of illegality, or the waiver of such objection by him, or even his express ¹⁶⁵ consent that the court may enforce such illegal contract, will not justify a court in enforcing the same. The illegality appearing, the court will sua sponte withhold all relief: See *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; 9 Cyc. 550. In *Ball v. Putnam* this court, after

saying that there was evidence tending to show that the contract which lay at the bottom of all the transactions between the parties was a contract void as against public policy, said: "Enough appears to call for a rigid inquiry by the trial judge, and if, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this action, for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor consent of the parties to it justifies the court in retaining jurisdiction of such an action."

It would seem to necessarily be the case under this well-settled rule that no action of the parties or their assignees can so validate an illegal contract as to justify a court in enforcing it where its illegality appears. An attempted compromise of a claim based on such a contract, whether before or after institution of action thereon, would be simply an act of the parties looking to the complete or partial ratification of the illegal contract, and which could in no way affect the power of the court to refuse to allow itself to be used as the instrument for its enforcement. We have been unable to find any case holding that a compromise of a claim based on such a contract is supported by a legal consideration and will be enforced by the courts, and it appears to us that any such holding would be in defiance of the well-settled rule under discussion and contrary to every consideration of public policy. It would furnish an easy method by which the parties to an illegal contract might by their mere stipulation validate the same, and make it compulsory upon the courts to thereafter enforce it, although its illegality was clearly made to appear. This cannot be the law. A court will not thus allow itself to be made, as has been said, "the handmaid of iniquity."

It was held in *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. 269, that no compromise by the parties of differences¹⁰⁶ in respect to clearly illegal contracts and transactions can purge them and produce a valid claim. The contract there involved was a gambling contract. The case of *Reed v. Brewer* (Tex. Civ. App.), 36 S. W. 99, is squarely in point. The action there was upon notes given in settlement of a suit brought upon an illegal contract, and it was held that the agreement of compromise did not so change and purify the transaction as to relieve it of its vice and illegality. Quoting

Bishop on Contracts, the court said: "A contract executed in consideration of a previous illegal one, or in compromise of differences growing out of it, is like that whereon it rests, illegal and incapable of being enforced." These decisions appear to us to be in accord with the rule under discussion, and, as already said, we have found no case holding to the contrary.

Under the rule which we hold applicable here, it would seem that the question as to whether Reid or the "undisclosed equitable owner," whom he testified that he represented, had actual notice of the circumstances under which the McMahon notes were given, was entirely immaterial in this controversy. Those notes, as already stated, were not negotiable, and the successors of McMahon took them subject to any objection that might be made to their validity. They stand here in the shoes of McMahon, and any answer to a claim based thereon that would have been available against him is available against them. This includes not only such defenses as might seasonably be urged by the maker of the notes, but also such objections to the enforcement of the claim on the ground of illegality as might appear to the courts when an attempt was made to enforce it. They took the notes with knowledge, conclusively imputed to them, that if they were ultimately found to be based upon an illegal consideration, there could be no recovery thereon, and that the maker of the notes could not by any agreement of ratification or compromise render them or instruments given in place thereof enforceable by the courts, when their illegality should be made to appear. The defense of want of notice of the illegality of a contract is available only where the contract is a negotiable instrument in the hands of one who has acquired it for value before maturity and in the ordinary course of business: See *Haight v. Joyce*, 2 Cal. 64, 56 Am. Dec. 311; *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746; *Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873. It is therefore unnecessary to determine whether the evidence shows that Reid had actual notice of the invalidity of the notes at the time they were transferred to him. It may, however, be stated that the evidence was certainly sufficient to sustain a finding that he had full notice of the claim of defendant in this regard prior to the first attempt at compromise, and that he made the compromise with knowledge imputed to him of the fact that the original notes were based on an unlawful consideration.

Under the views we have expressed, the trial court did not err in admitting the testimony objected to, and the evidence was sufficient to support the findings in so far as the same are essential to the validity of the judgment.

Complaint is made by plaintiff that the trial court failed to find upon certain affirmative defenses tendered by the answer—viz., one of former action pending, and another of a previous order or judgment decreeing the instruments in suit to be void and of no effect. The failure to find on the issues thus tendered could not prejudicially affect plaintiff here, in view of the other findings which make it essential that judgment should go against him, even had findings been made in his favor on these issues.

The judgment and order are affirmed.

Shaw, J., Henshaw, J., Lorigan, J., McFarland, J., and Beatty, C. J., concurred.

DEFENSES TO NOTES AND OTHER OBLIGATIONS GIVEN FOR GAMBLING DEBTS.

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II. Modern Doctrine.

- a. As Between the Original Parties, 173.
- b. As Against an Assignee with Notice, 175.
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III. Defenses to Obligations Given to Secure Loans for Gambling Purposes.

- a. In General, 178.
- b. When Securities were Given by Loser to One Who Loaned Money to Pay His Losses, 179.

IV. Defenses to Contracts and Conveyances Collateral to Gambling Transactions.

- a. In General, 179.
- b. Bills of Sale, 179.
- c. Conveyances of Land, 180.
- d. Judgments, 180.

V. Renewals and Compromises, 180.

VI. Defenses in Equity, 180.

I. Defenses at Common Law.

Under the common law gambling contracts were valid, and hence the fact that an action was based on an obligation given for a gambling consideration was no defense. The early English courts were loth to recognize the common-law principle regarding the validity of obligations of this character, but any attempt to recognize a defense on the ground of illegality of consideration, because the note or other obligation was founded on a gambling transaction, was finally aban-

done. It was said by Lord Campbell in *Thackoorsegdass v. Dhondmull*, 6 Moore P. C. 300, 4 Moore Ind. App. 339, 12 Jur. 315: "I regret to say that we are bound to consider the common law of England to be, that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interest or feelings of third persons, and does not lead to indecent evidence and is not contrary to public policy. I look with concern, and almost with shame, on the subterfuges and contrivances and evasions to which judges in England long resorted, in struggling against this rule." As to whether the common law on this question should be recognized by the American courts in the absence of any statute, the courts of this country were divided. Some held that the rule at common law was not applicable under American institutions and conditions, and that an obligation given upon a gambling consideration was not enforceable here, even under the common law: *Eldred v. Malloy*, 2 Colo. 320, 20 Am. Rep. 752; *Boughner v. Meyer*, 5 Colo. 71, 40 Am. Rep. 139; *Wheeler v. Spencer*, 15 Conn. 28; *Cleveland v. Wolff*, 7 Kan. 184; *Stacey v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *Ball v. Gilbert*, 12 Met. (Mass.) 397; *Love v. Harvey*, 114 Mass. 80; *Wilkinson v. Towsley*, 16 Minn. 299, 10 Am. Rep. 139; *Beattie v. Hoyt*, 3 Mont. 140; *Hoit v. Hodge*, 6 N. H. 104, 25 Am. Dec. 451; *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 93; *Bernard v. Taylor*, 23 Or. 416, 37 Am. St. Rep. 693, and note, 31 Pac. 968, 18 L. R. A. 859; *Edgell v. McLaughlin*, 6 Whart. (Pa.) 176, 36 Am. Dec. 214; *Waugh v. Beck*, 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923; *Stoddard v. Martin*, 1 R. I. 1, 19 Am. Dec. 643; *Rice v. Gist*, 1 Strob. (S. C.) 82; *Noyes v. Spaulding*, 27 Vt. 420. Others held that such obligations were valid and enforceable: *Tindall v. Childress*, 2 Stew. & P. (Ala.) 250; *Jeffrey v. Ficklin*, 3 Ark. 227, 36 Am. Dec. 456; *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518; *Johnston v. Russell*, 37 Cal. 670; *Porter v. Sawyer*, 1 Harr. (Del.) 517; *Ross v. Green*, 4 Harr. (Del.) 308; *Deweese v. Miller*, 5 Harr. (Del.) 347; *Smith v. Smith*, 21 Ill. 244, 74 Am. Dec. 100; *Beadles v. Bliss*, 27 Ill. 320, 81 Am. Dec. 231; *Sipe v. Finarty*, 6 Iowa, 394; *Greathouse v. Thockmorton*, 7 J. J. Marsh. (N. Y.) 16; *Waddle v. Loper*, 1 Mo. 635; *Mulford v. Bowen*, 9 N. J. L. 315; *Trenton etc. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Bunn v. Riker*, 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; *Campbell v. Richardson*, 10 Johns. (N. Y.) 406; *Zeltner v. Irwin*, 25 N. Y. App. Div. 228, 49 N. Y. Supp. 337; *Brown v. Brady's Admr.*, 6 N. C. 117; *Morgan v. Richards*, 1 Browne (Pa.), 171; *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748; *Harding v. Walker*, 11 Fed. Cas. No. 6050a, Hempst. 53.

II. Modern Doctrine.

a. *As Between the Original Parties.*—In England, by statute (9 Anne, c. 14), all gambling contracts were declared void. Similar statutes have been passed in almost every state in this country, and

now such contracts are universally declared contra bonos mores and invalid; and the illegality of consideration is a good defense both in England and America, as between the parties, in all actions founded on obligations given in consideration of a gambling debt: Trammell v. Gordon, 11 Ala. 656; Brewer v. Morgan, 13 Ala. 551; Finn v. Barclay, 15 Ala. 626; Hawley v. Bibb, 69 Ala. 52; Fuller v. Hutchins, 10 Cal. 523, 70 Am. Dec. 746; Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110; Union Collection Co. v. Buckman, 150 Cal. 159, ante, p. 164, 88 Pac. 708, 9 L. R. A., N. S., 568; Boughner v. Meyer, 5 Colo. 71, 40 Am. Rep. 139; Justh v. Holliday, 2 Mackey (D. C.), 346; Cunningham v. National Bank of Augusta, 71 Ga. 400, 51 Am. Rep. 266; Benson v. Dublin Warehouse Co., 99 Ga. 303, 25 S. E. 645; Little v. Stokeley, 99 Ga. 306, 25 S. E. 650; Brown v. Alexander, 29 Ill. App. 626; International Bank v. Van Kirk, 39 Ill. App. 23; Treat v. Syndecker, 92 Ill. App. 458; Sondheim v. Gilbert, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687, 5 L. R. A. 432; Davis v. Davis, 119 Ind. 511, 21 N. E. 1112; Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281; Chambers v. Simpson's Admr., 1 T. B. Mon. (Ky.) 112; Thompson v. Moore, 4 T. B. Mon. (Ky.) 79; Standeford's Admr. v. Schultz, 5 B. Mon. (Ky.) 581; Brittain v. Duling, 15 B. Mon. (Ky.), 138; Clark v. Havens, 1 A. K. Marsh. (Ky.), 198; Spies v. Rosenstock, 87 Md. 14, 39 Atl. 268; Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35; Bride v. Clark, 161 Mass. 130, 36 N. E. 745; McNamara v. Gargett, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; McAuley v. Mardis, Walk. (Miss.) 307; Crawford v. Storms, 41 Miss. 540; Virden v. Murphy, 78 Miss. 515, 28 South. 851; Woolfolk v. Duncan, 80 Mo. App. 421; Sprague v. Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679; Cutler v. Welsh, 43 N. H. 497; Lansing v. Lansing, 8 Johns. (N. Y.) 454; Denniston v. Cook, 12 Johns. (N. Y.) 376; Hollingsworth v. Moulton, 53 Hun, 91, 6 N. Y. Supp. 362; Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; Lagonda Nat. Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634; Swartz's Appeal, 3 Brewst. (Pa.) 131; Edgell v. McLaughlin, 6 Whart. (Pa.) 176, 36 Am. Dec. 214; Gaw v. Bennett, 153 Pa. 247, 34 Am. St. Rep. 699, 25 Atl. 1114; Stoddard v. Martin, 1 R. I. 1, 19 Am. Dec. 643; Atwood v. Weeden, 12 R. I. 293; Winward v. Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; Russell v. Pyland, 2 Humph. (Tenn.) 131, 36 Am. Dec. 307; Giddens v. Lea, 3 Humph. (Tenn.) 133; Snoddy v. American Nat. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705; Connor v. Mackey, 20 Tex. 747; Seligson v. Lewis, 65 Tex. 215, 57 Am. Rep. 593; Oliphant v. Markham, 79 Tex. 543, 23 Am. St. Rep. 363, 15 S. W. 569; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; Shain v. Goodwin, 46 Fed. 564; Morris v. Norton, 75 Fed. 912, 21 C. C. A. 553; Hay v. Ayling, 30 L. J. Q. B. 171, 16 Q. B. 423, 15 Jur. 605; Hitchcock v. Way, 6 Ad. & E. 943, 2 Nev. & P. 72, W. W. & D. 491, 6 L. J. Q. B. 215; St. Croix v. Morris, 1 Cab. & E. 485. There are two American cases which announce a contrary doctrine.

In *Budolph v. Winters*, 7 Neb. 125, a defense of illegality was refused in an action on a duebill given for a gambling debt, but this ruling was repudiated in the later case of *Sprague v. Warren*, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679. And in *Russell v. Kidd* (Tex. Civ. App.), 84 S. W. 273, it is held that where a draft was drawn for money collected for the plaintiff, the drawer could not defeat liability in an action thereon by the drawee, on the ground that it represented the profits in a gambling transaction to which plaintiff and defendant were parties. A similar doctrine is announced in *Buston v. Buston*, 45 L. J. Ex. 230, 1 Ex. D. 13, 33 L. T. 700, 24 Week. Rep. 96, upon the ground that in England the statute declares gambling contracts void only, but not illegal. These three cases, however, are contrary to the overwhelming weight of authority.

b. As Against an Assignee with Notice.—The rule that a gambling consideration for a note or other obligation is a good defense, as between the original parties to an action to enforce such obligation, also applies when the action is brought by an assignee of the note who took with notice of the consideration: *Barker v. Callihan*, 5 Ala. 708; *Finn v. Barclay*, 15 Ala. 626; *Howley v. Bibb*, 69 Ala. 52; *Fuller v. Hutchins*, 10 Cal. 523, 70 Am. Dec. 746; *Union Collection Co. v. Buckman*, 150 Cal. 159, ante, p. 164, 88 Pac. 708, 9 L. R. A., N. S., 568; *Boughner v. Meyer*, 5 Colo. 71, 40 Am. Rep. 139; *Justh v. Holliday*, 2 Mackey (D. C.), 346; *Cunningham v. National Bank*, 71 Ga. 400, 51 Am. Rep. 266; *Benson v. Dublin Warehouse Co.*, 99 Ga. 303, 25 S. E. 645; *Little v. Stokeley*, 99 Ga. 306, 25 S. E. 650; *Brown v. Alexander*, 29 Ill. App. 626; *International Bank v. Van Kirk*, 39 Ill. App. 23; *Treat v. Syndecker*, 92 Ill. App. 458; *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687, 5 L. R. A. 432; *Davis v. Davis*, 119 Ind. 511, 21 N. E. 1112; *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281; *Thompson v. Moore*, 4 T. B. Mon. (Ky.) 79; *Lyle v. Lindsey*, 5 B. Mon. (Ky.) 123; *Spies v. Rosenstock*, 87 Md. 14, 39 Atl. 268; *Murphy v. Rogers*, 151 Mass. 118, 24 N. E. 35; *Bride v. Clark*, 161 Mass. 130, 36 N. E. 745; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; *Crawford v. Storms*, 41 Miss. 540; *Virden v. Murphy*, 78 Miss. 515, 28 South. 851; *Woolfolk v. Duncan*, 80 Mo. App. 421; *Sprague v. Warren*, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679; *Cutler v. Welsh*, 43 N. H. 497; *Joseph v. Miller*, 1 N. Mex. 621; *Lansing v. Lansing*, 8 Johns. (N. Y.) 454; *Denniston v. Cook*, 12 Johns. (N. Y.) 376; *Hollingsworth v. Moulton*, 53 Hun, 91, 6 N. Y. Supp. 362; *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; *Lagonda Nat. Bank v. Portner*, 46 Ohio St. 381, 21 N. E. 634; *Edgell v. McLaughlin*, 6 Whart. (Pa.) 176, 36 Am. Dec. 214; *Gaw v. Bennett*, 153 Pa. 247, 34 Am. St. Rep. 699, 25 Atl. 1114; *Stoddard v. Martin*, 1 R. I. 1, 19 Am. Dec. 643; *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; *Sharp v. Smith*, 7 Rich. (S. C.) 3; *Russell v. Pyland*, 2 Humph. (Tenn.) 131, 36 Am. Dec. 807; *Giddens v. Lea*, 3 Humph. (Tenn.) 133; *Snoddy v. American*

Nat. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705; Connor v. Mackey, 20 Tex. 747; Seligson v. Lewis, 65 Tex. 215, 57 Am. Rep. 593; Oliphant v. Markham, 79 Tex. 543, 23 Am. St. Rep. 363, 15 S. W. 569; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; Savings Bank v. National Bank of Commerce, 38 Fed. 800; Shain v. Goodwin, 46 Fed. 564; Morris v. Norton, 75 Fed. 912, 21 C. C. A. 553; Hay v. Ayling, 30 L. J. Q. B. 171, 16 Q. B. 423; 15 Jur. 605; Steers v. Lashley, 6 Term Rep. 61; Brown v. Turner, 7 Term Rep. 626; Ex parte Mather, 3 Ves. Jr. 373.

c. **As Against Assignee Who is Bona Fide Holder.**—The ordinary rule regarding negotiable instruments, that a bona fide purchaser for value before maturity is protected against defenses which could be made against the original maker, has not been universally adopted in reference to obligations given for gambling debts. In fact, there is a hopeless conflict of authority in this question. In some jurisdictions, a bona fide holder of negotiable paper purchased for value, and before maturity is entitled to recover, no matter how illegal the consideration may be: Haight v. Joyce, 2 Cal. 66, 56 Am. Dec. 311; Fuller v. Hutchins, 10 Cal. 523, 70 Am. Dec. 746; Union Collection Co. v. Buckman, 150 Cal. 159, ante, p. 164, 88 Pac. 708, 9 L. R. A., N. S., 568; Boughner v. Meyer, 5 Colo. 71, 40 Am. Rep. 139; Sullivan v. German Nat. Bank, 18 Colo. App. 99, 70 Pac. 162; Adams v. Wooldridge, 4 Ill. 255; Shirley v. Howard, 53 Ill. 455; Town of Eagle v. Kohn, 84 Ill. 292; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Biegler v. Merchants' L. & T. Co., 164 Ill. 197, 45 N. E. 512; Wright v. Crabbs, 78 Ind. 487; Sondheim v. Gilbert, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687, 5 L. R. A. 432; Jones v. Sevier, 1 Litt. (Ky.) 50, 13 Am. Dec. 218; Shaw v. Clark, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786; Davis v. Seeley, 71 Mich. 209, 38 N. W. 901; Third Nat. Bank v. Tinsley, 11 Mo. App. 498; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713; Higginbotham v. McGrudy, 183 Mo. 96, 105 Am. St. Rep. 461, 81 S. W. 883; Northern Nat. Bank v. Arnold, 187 Pa. 356, 40 Atl. 794; Third Nat. Bank v. Harrison, 3 McCrary, 316, 10 Fed. 243; Jackson v. Foote, 11 Biss. 223, 12 Fed. 37; Mitchell v. Catchins, 23 Fed. 710; Hatch v. Burroughs, 11 Fed. Cas. No. 6203, 1 Woods, 439; Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. Rep. 130, 35 L. ed. 925; Edwards v. Dick, 4 Barn. & Ald. 212, 23 R. R. 255; Robinson v. Bland, 2 Burr. 1082; Greenland v. Dyer, 2 M. & R. 422; Harker v. Hallewell, 3 Smale & G. 194; Fitch v. Jones, 5 El. & B. 238, 24 L. J. Q. B. 293, 1 Jur., N. S., 854, 3 Week. Rep. 507. But there are an equally large number of authorities holding that the illegality of the consideration is a good defense even at the suit of a bona fide purchaser for value before maturity: Manning v. Manning, 8 Ala. 138; Whitlock v. Stewart, 15 Ala. 601; Pendleton v. Smissaert, 1 Colo. App. 508, 29 Pac. 521; Conklin v. Roberts, 36 Conn. 461; Lulley v. Morgan, 21 D. C. 88; Cunningham v. National Bank, 71 Ga. 400, 51 Am. Rep. 266; Williams v. Judy, 8 Ill. 282, 44 Am. Dec. 699; Chapin v. Dake, 57 Ill. 295, 11 Am. Rep. 15; Tenney v. Foote, 95

Ill. 99; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; Davis v. Davis, 119 Ind. 511, 21 N. E. 1112; Craig v. Andrews, 7 Iowa, 17; Traders' Bank v. Alsop, 64 Iowa, 97, 19 N. W. 863; Creston First Nat. Bank v. Carroll, 80 Iowa, 11, 45 N. W. 304, 8 L. R. A. 275; Morton v. Fletcher, 2 A. K. Marsh. (Ky.) 137, 12 Am. Dec. 366; Pace v. Martin, 2 Duvall (Ky.), 522; Bohon's Assignees v. Brown, 101 Ky. 354, 72 Am. St. Rep. 420, 41 S. W. 275, 38 L. R. A. 503; Alexander & Co. v. Hazelrig (Ky.), 97 S. W. 353; Gough v. Pratt, 9 Md. 526; Emerson v. Townsend, 73 Md. 224, 20 Atl. 984; Lucas v. Waull, 12 Smedes & M. (Miss.) 157; Martin v. Terrell, 12 Smedes & M. (Miss.) 571; Evans v. Cook, 11 Nev. 69; Vallett v. Parker, 6 Wend. 615; Cunningham v. Gans, 79 Hun (N. Y.), 434, 29 N. Y. Supp. 979; Lagonda Nat. Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634; Unger v. Boas, 13 Pa. 601; Harper v. Young, 112 Pa. 419, 3 Atl. 670; Griffith v. Sears, 112 Pa. 523, 4 Atl. 492; Mordecai v. Dawkins, 9 Rich. (S. C.) 262; Blair v. Brabson, 3 Hayw. (Tenn.) 18; Snoddy v. American Nat. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705; Allen v. Dunham, 92 Tenn. 257, 21 S. W. 898; Woodson v. Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612; Hurlburt v. Straub, 54 W. Va. 303, 46 S. E. 163; Lloyd v. Scott, 4 Pet. 205, 7 L. ed. 833; Hitchcock v. Way, 6 Ad. & E. 943; Day v. Stuart, 6 Bing. 109, 3 Moore & P. 334; Shillito v. Theed, 7 Bing. 405; Lowe v. Waller, 2 Doug. 736; Cooke v. Strafford, 13 Mees. & W. 379; Henderson v. Benson, 8 Price, 288; Bowyer v. Brampton, 2 Strange, 1155.

An attempt has been made by some writers to reconcile the conflict of opinion among the American courts as to the rights of bona fide holders of notes and other obligations founded on gambling debts by the statement that in some of the states the statute merely declares gambling transactions illegal and void, while in others it declares that the notes or other obligations founded on such transactions are themselves void. This distinction was undoubtedly drawn by the court in Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568, where it was said: "Some of the expressions in the text-books are to the effect that, when a statute expressly declares the contract or transaction which forms the consideration of the note or bill to be void, the note or bill is illegal and void, even in the hands of a bona fide holder for value; but the weight of authority sustains the position that, while such note or bill is void as between the parties to it, it is not void as against the holder for value without notice unless the statute also declares the note or bill itself to be void. Mr. Daniel, in his work on Negotiable Instruments, section 800, thus succinctly states the doctrine: 'In all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover.' The same view was expressed by this court in Town of Eagle v. Kohn, 84 Ill. 292, where we said: 'The doctrine is laid down generally, that in those cases in which the legislature has declared that the illegality of the contract shall make the security, whether bill or note, void, the

defendant may insist on such illegality, though the plaintiff took the bill or note bona fide, and gave a valuable consideration for it. But unless it has been so expressly declared by the legislature, illegality of consideration will be no defense in an action at the suit of a bona fide holder without notice of the illegality, unless he obtained the bill or note after it became due." The distinction sought to be made in this case does not seem to have been followed by other courts. In *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705, it was held that the note need not be expressly declared void by statute, but if it was so declared by implication, it was sufficient, and that when a statute declared gambling contracts were void, securities given in such transactions were also void by implication. It was also here held that even a subsequent promise by the maker to pay did not render him liable. In the recent case of *Alexander & Co. v. Hazelrig (Ky.)*, 97 S. W. 353, it was also held that a note or other security given for a gambling debt was invalid by implication, if the statute declared gambling transactions illegal. On the other hand, in *Higginbotham v. McGrudy*, 183 Mo. 96, 105 Am. St. Rep. 461, 81 S. W. 883, it was held that a note given to take up checks which the maker had given to obtain money to continue in a game of poker could be enforced in the hands of an innocent purchaser, although the statute declared that "notes, the consideration of which is money won at gambling, shall be void, though assigned."

d. Presumption as to Bona Fides.—Contrary to the general rule, in a suit by the assignee of a note or other obligation, the consideration of which is a gambling debt, the burden of proving that he took without notice before maturity for value is upon the holder of the note: *Fuller v. Hutchins*, 10 Cal. 523, 70 Am. Dec. 746; *Union Collection Co. v. Buckman*, 150 Cal. 159, ante, p. 164, 88 Pac. 708, 9 L. R. A., N. S., 568; *Standeford's Admr. v. Shultz*, 5 B. Mon. (Ky.) 581. But some courts hold that where commercial paper, originally valid, has been transferred in payment of a gambling debt, that the illegality of the gambling is no defense to a suit by the indorsee against the maker: *Poorman v. Mills*, 39 Cal. 345, 2 Am. Rep. 451; *Reed v. Bond*, 96 Mich. 134, 55 N. W. 619; *Lee's Admr. v. Ware*, 1 Hill (S. C.), 313.

III. Defenses to Obligations Given to Secure Loans Made for Gambling Purposes.

a. In General.—It is held by some courts that securities taken for money loaned for the express purpose of gambling in a manner prohibited by law cannot be enforced: *Lee v. Boyd*, 86 Ala. 283, 5 South. 489; *Plank v. Jackson*, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; *Levy v. Perkins*, 4 Bibb. (Ky.) 505; *Colyer v. Ransom*, 4 Bibb. (Ky.) 552; *Emmerson v. Townsend*, 73 Md. 224, 20 Atl. 284; *Spies v. Rosencstock*, 87 Md. 14, 39 Atl. 268; *Cutler v. Welsh*, 43 N. H. 497; *Jones v. Aken (Tex. Civ. App.)*, 80 S. W. 385; *Marden v. Phillips*, 103 Fed. 196; *Hay v. Ayling*, 30 L. J. Q. B. 171, 16 Q. B. 423, 15 Jur. 605.

In *Lee v. Poyd*, 86 Ala. 283, 5 South. 489, the holder of certain bonds, who was not the real owner, transferred them to obtain money with which to buy fixtures, and the transferee advanced the money with knowledge of the purpose for which it was to be used. It was held that he could not hold the bonds against the real owner, though he had no knowledge of the defect in the title of his assignor. In *Morden v. Phillips*, 103 Fed. 196, a bill of sale given as security for a loan of money to be used in gambling was declared invalid against a trustee in bankruptcy.

There are many other authorities, however, holding that mere knowledge as to the use to which the borrower intended to apply the money would not defeat recovery: *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. 22; *Singleton v. Monticello Bank*, 113 Ga. 527, 38 S. E. 947; *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356; *Waugh v. Beck*, 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Kinney v. Hynds*, 7 Wyo. 27, 49 Pac. 403, 52 Pac. 1081.

b. When Securities were Given by Loser to One Who Loaned Money to Pay His Losses.—Money paid by a third party at the request of a loser in discharge of a gambling debt has generally been held recoverable, although the lender knew the purpose for which the money was to be used. Hence a note given by the loser to the lender in such case is recoverable: *White v. Garbrough*, 16 Ala. 109; *Brooks v. Brady*, 53 Ill. App. 155; *Wyman v. Fiske*, 3 Allen (Mass.), 238, 80 Am. Dec. 66; *Boggess v. Lily*, 18 Tex. 200; *Oalds v. Harrison*, 10 Ex. 572, 3 C. L. R. 353, 24 L. J. Ex. 66, 3 Week. Rep. 160.

IV. Defenses to Contracts and Conveyances Collateral to Gambling Transactions.

a. In General.—Contracts and conveyances collateral to gambling transactions are tainted with the vice; hence, all securities given for gambling considerations are void: *International Bank v. Van Kirk*, 39 Ill. App. 23; *Gough v. Pratt*, 9 Md. 526; *Evans v. Cook*, 11 Nev. 69; *Turner v. Peacock*, 13 N. C. 303; *Haley v. Long*, 1 Peck (Tenn.), 93; *Applegarth v. Colley*, 10 Mees. & W. 723, 7 Jur. 18, 12 L. J. Ex. 34.

In *Turner v. Peacock*, 13 N. C. 303, a bond taken in compromise of an action upon a gambling contract was declared void; and in *Haley v. Long*, 1 Peck, 93, it was held that a bond given in an award by the court in an action founded on a bond given for a gambling debt was void, even in the hands of a bona fide purchaser.

b. Bills of Sale.—So, also, a bill of sale of goods lost at gambling is void, and a note or check given to the assignee of such bill of sale is without consideration where there was no actual delivery of the goods; but contra if the goods had actually been delivered to the assignee by the winner: *Willis v. Holladay*, 1 Spear, 379, 40 Am. Dec. 606.

c. **Conveyances of Land.**—Conveyances of land made for a gambling consideration are void: *Trammell v. Gordon*, 11 Ala. 656; *Boat-right v. Porter's Heirs*, 32 Ga. 130; *International Bank v. Van Kirk*, 39 Ill. App. 23. But it has been held that the illegality of the consideration in such a case is no defense against a bona fide purchaser: *Fenno v. Tayre*, 3 Ala. 458; *Chiles v. Coleman*, 2 A. K. Marsh. (Ky.) 296, 12 Am. Dec. 396. Though in *International Bank v. Van Kirk*, 39 Ill. App. 23, a trust deed given to secure a note with a gambling consideration was declared void, although in the hands of an innocent purchaser.

d. **Judgments.**—In some jurisdictions it is even held that a judgment rendered on securities given for a gambling debt is void: *Butler v. Nohr*, 98 Ill. App. 624; *Gough v. Pratt*, 9 Md. 526; *Smithers v. Keys*, 30 Miss. 179; *Campbell v. New Orleans Nat. Bank*, 74 Miss. 526, 21 South. 400, 23 South. 25. But in *Holland v. Pirtte*, 10 Humph. (Tenn.) 167, it was held that the illegality of the contract upon which the judgment was obtained does not vitiate a judgment taken by default. In other jurisdictions, such judgments are invalid only when taken by confession: *Wilkerson v. Whitney*, 7 Mo. 295; *Teague v. Perry*, 64 N. C. 39; *Wilford v. Gilham*, 29 Fed. Cas. No. 17,376, 2 Cranch C. C. 556; *Lane v. Chapman*, 11 Ad. & E. 966.

V. Renewals and Compromises.

The law will not countenance an attempt to ratify an illegal contract; hence renewals of a note given for a gambling debt have no more validity than the original, and the same defense that could be made in a suit on the original note can be made in a suit on the renewed obligation: *Stone v. Mitchell*, 7 Ark. 91; *International Bank v. Van Kirk*, 39 Ill. App. 23; *Hollingsworth v. Moulton*, 53 Hun (N. Y.), 91, 6 N. Y. Supp. 362; *Haley v. Long*, 1 Peck (Tenn.), 93; *Hay v. Ayling*, 30 L. J. Q. B. 171, 16 Q. B. 423, 15 Jur. 605. And the compromise of a claim, even if in suit, does not constitute consideration for a new province if the original note is based on a gambling contract: *Union Collection Co. v. Buckman*, 150 Cal. 159, ante, p. 164, 88 Pac. 708, 9 L. R. A., N. S., 568; *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150; *Creutz v. Hill*, 89 Ky. 429, 12 S. W. 926; *Pitkins v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Grandin v. Grandin*, 49 N. J. L. 508, 60 Am. Rep. 642, 9 Atl. 756; *Gould v. Armstrong*, 2 Hall, 290; *Turner v. Peacock*, 13 N. C. 303; *Haley v. Long*, 1 Peck (Tenn.), 93; *Reid v. Brewer* (Tex. Civ. App.), 36 S. W. 99; *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. 269.

VI. Defenses in Equity.

Ordinarily, equity will not grant relief to either party to a gambling transaction, because both are in *pari delicto*, but in some jurisdictions the collection of a note given for a gambling debt will be enjoined: *Finn v. Barclay*, 15 Ala. 626; *Roberts v. Taylor*, 7 Port. (Ala.), 251;

Rice v. Winslow, 182 Mass. 273, 65 N. E. 366; Portarlington v. Soulby, 3 Mylne & K. 104; or decreed to be delivered up and canceled: Davidson v. Givins, 2 Bibb. (Ky.) 200, 4 Am. Dec. 695; Rice v. Winslow, 182 Mass. 273, 65 N. E. 366; Tantum v. Arnold, 42 N. J. Eq. 60, 6 Atl. 316; Rucker v. Wynne, 2 Head (Tenn.), 617; Osbaldiston v. Simpson, 13 Sim. 513, 7 Jur. 736; Wynne v. Callendar, 1 Russ. 293, 46 Eng. Ch. 259; and even a judgment obtained on a note, bond or other contract given for a gambling debt can be perpetually enjoined or set aside: Cheatham v. Young, 5 Ala. 353; West v. Carter, 129 Ill. 249, 21 N. E. 782; Gill v. Webb's Admr., 2 T. B. Mon. (Ky.) 4; Smithers v. Keyes, 30 Miss. 179; and this notwithstanding the judgment was obtained by default: Paulding v. Watson, 21 Ala. 279; Clay v. Fey, 3 Bibb. (Ky.) 248, 6 Am. Dec. 654; or by confession: West v. Carter, 129 Ill. 249, 21 N. E. 782; Everett v. Knapp, 6 Johns. 331.

JOHNSON v. TAYLOR.

[150 Cal. 201, 88 Pac. 903.]

TAX TITLE, Purchase by the State—Notice of Expiration of Time for Redemption.—A provision of the statute requiring persons purchasing at a tax sale to give notice of the expiration of the time to redeem applies when the state, as well as when a private individual, is a purchaser. (p. 183.)

TAX SALES, Redemption from—Conflict of Laws.—Ordinarily, the time of redemption from a tax sale is governed by the law in force when it was made. (p. 184.)

TAX SALES—Constitutional Law—Statute Attempting to Change the Time of Redemption.—If the statute existing when a tax sale is made gives the property owner the right to redeem until the notice therein prescribed of the expiration of the time for redemption is given, a subsequent statute attempting to dispense with such notice is unconstitutional. (p. 186.)

ACTION to Determine Conflicting Claims of Title—Cross-complaint.—If the defendant in an action to determine conflicting claims of title files a cross-complaint averring title in himself, and asking that his title be quieted, and the plaintiff neither demurs nor moves to strike out, but, answering, goes to trial on the merits, the court may render a decree in defendant's favor quieting his title as prayed for by him. (pp. 187, 188.)

Thomas, Pemberton & Thomas, for the appellant.

Mannon & Mannon, for the respondents.

²⁰² **SLOSS, J.** The plaintiff brought this action to quiet title to certain land in Mendocino county. The defendants answered, denying the plaintiff's title, and filed cross-com-

plaints setting up title in themselves and praying that their title be quieted against the plaintiff. Judgment went for the defendants, granting them the affirmative relief sought by them. The plaintiff's motion for a new trial was denied, and he now appeals from the judgment and from the order denying his motion for a new trial.

Defendants are the heirs and successors in interest of W. H. Johnson, and it is admitted that they are the owners of the land, unless W. H. Johnson's title was divested by certain tax proceedings culminating in a deed from the state of California to the plaintiff. The land in question was assessed to W. H. Johnson for the year 1893, and was sold to the state for nonpayment of taxes on July 7, 1894. The tax collector executed a deed to the state on July 7, 1899, and a deed was executed to the plaintiff by the tax collector, acting under the authorization of the state controller, on May 3, 1902. On account of some irregularities in the original deed to the state, an amended deed to the state was executed on April 8, 1902: Pol. Code, sec. 3805b; Stats. 1901, p. 651.

At the trial the defendants interposed various objections to the introduction in evidence of these instruments. The objections were sustained, and the appellant upon the appeal from the order denying his motion for a new trial seeks to review these rulings. If any of the objections made was good, the evidence of the tax proceedings was properly excluded. We are satisfied that the respondents are correct in their contention that there is at least one fatal objection to the validity of the tax deeds to the state, and it will be unnecessary, therefore, to consider the other objections. In 1894, when the sale of the property was made, the Political Code provided that if property sold for nonpayment of taxes was not redeemed within the time allowed by law, the tax collector must make to the purchaser, or his assignee, a deed of the property; providing, however, that such purchaser, or his assignee, must, thirty days previous to the expiration of the time for such redemption, or thirty days before he applies for the deed, serve upon the owner of the property, or upon the person occupying it, a written notice showing, among other things, ²⁰³ when the right of redemption will expire, or when the purchaser will apply for a deed. And it was provided that no deed should be issued by the tax collector until this notice should have been given, and an affidavit filed with the tax collector showing that it had been given: Pol. Code, sec.

3785, amended 1891; Stats. 1891, p. 124. Section 3780 of the same code provided that a redemption might be made by the owner or any party in interest within twelve months from the date of the purchase, or at any time prior to the filing of the affidavits and the application for a deed, as provided for in section 3785: Stats. 1891, p. 133. As the law then stood, a deed could not be issued to the purchaser without the giving of the notice required by section 3785 (*Hughes v. Canedy*, 92 Cal. 382, 28 Pac. 573), and one relying on a tax deed was bound to establish the giving of such notice as a part of his proof of title: *Miller v. Miller*, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Walsh v. Burke*, 134 Cal. 594, 66 Pac. 866. Furthermore, this court has held in *San Francisco & F. Land Co. v. Banbury*, 106 Cal. 129, 39 Pac. 439, that the requirement of giving notice applied as well to the state as to a private purchaser.

In the case at bar there was no proof of any such notice having been given, and it would follow, if the case is to be decided on the law as it existed when the sale was made, that the plaintiff failed to establish that any title ever passed from W. H. Johnson to the state.

The appellant contends, however, that the validity of the deed is to be determined by the provisions of law existing at the time such deed was made, rather than at the date of sale. Between 1894, when the sale took place, and 1899, when the deed was executed, the law relating to redemption from tax sales and the execution of tax deeds was materially altered. In 1895 the legislature passed a series of amendments to the Political Code, changing the entire scheme of tax sales. Since 1895 it is provided that all property sold for delinquent taxes shall be sold to the state, and no sales to private purchasers are permitted, as they were prior to the time of these amendments: Pol. Code, sec. 3771; Stats. 1895, p. 377. By section 3785, as then amended, the tax collector is required to make a deed to the state if the property is not redeemed²⁰⁴ within the time (five years) allowed by law for its redemption. The provision for notice of intention to provide for a deed was eliminated from section 3785. Section 3780 was at the same time amended so as to provide that a redemption might be made within five years from the date of the purchase, or at any time prior to the entry or sale of the land by the state. And the land became subject to such entry or sale im-

mediately upon the filing of the tax collector's deed with the proper officer: Pol. Code, secs. 3788, 3897.

To apply section 3785, as amended, to sales made before the amendment went into effect, would undoubtedly give the amendment a retroactive effect. Whatever may be the general rule as to construing sections of the code so as to prevent their having a retroactive effect (Pol. Code, sec. 3), the legislature has, in this instance, declared plainly its intent that the amendment to section 3785 should apply to all tax deeds thereafter made, whether or not the sale had already taken place. It appears that the legislature in 1895 enacted two different amendments to section 3785 of the Political Code. They are substantially similar so far as the points already noted are concerned. One was approved February 25, 1895, and the other March 28, 1895. The latter, after setting forth the provisions for the making of a deed by the tax collector to the state, in the event the property is not redeemed within the time allowed by law, contains the following language: "In all cases where land has heretofore been sold to the state for delinquent taxes, the deed therefor shall be made to the state within one year after this act takes effect; provided five years shall have elapsed after the date of such sale." In view of this provision it cannot be doubted that the legislature intended to make and did make section 3785 apply to cases of sales made prior to the adoption of the amendment, and such amendment must therefore be given a retroactive effect, unless some constitutional right would be violated by giving it such effect.

Ordinarily, "the right of redemption from a tax sale must be governed by the law in force at the time of the sale; it cannot be affected by subsequent legislation": Black on Tax Titles, sec. 175. In *Teralta Land & W. Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194, 48 Pac. 613, this court said: "The question here, however, is: Can the legislature, after ²⁰⁵ a tax sale, lawfully amend the law so as to provide new and more onerous conditions to the right to redeem than those which existed when the sale was made? We think this question is answered in the negative by the elementary writers and by the adjudicated cases." In support of this conclusion the court cites Cooley on Constitutional Limitations, 6th ed., p. 353; Black on Tax Titles, sec. 175; Blackwell on Tax Titles, 5th ed., sec. 729; *Negus v. Yancey*, 22 Iowa, 57; *Goenen v. Schroeder*, 8 Minn. 387; *Robinson v. Howe*, 13 Wis. 341;

Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240; Moody v. Hoskins, 64 Miss. 468, 1 South. 622; Caruthers v. McLaran, 56 Miss. 371; Wolfe v. Henderson, 28 Ark. 304. In the Teralta case the court quotes the following from Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721: "The right of property acquired by the purchaser at this sale and the right of redemption remaining to the owner must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor." Accordingly, it was held in the Teralta case that the legislature could not constitutionally, as to past tax sales, pass a law increasing the penalties to be paid on redemption. See, also, Collier v. Shaffer, 137 Cal. 319, 70 Pac. 177, in which the court said: "The redemption of land so sold to the state is governed by the law in force at the date of the sale." If Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515, and Moore v. Martin, 38 Cal. 428, are inconsistent with these views, they must be regarded as overruled by later cases: See Welsh v. Cross, 146 Cal. 621, 106 Am. St. Rep. 63, 81 Pac. 229.

We think the principle of Teralta Land & W. Co. v. Shaffer, 116 Cal. 518, 58 Am. St. Rep. 194, 48 Pac. 613, is decisive of the case at bar. Under the law as it existed at the time of the sale, the plaintiff's right of redemption was not limited by any fixed time. It lasted at least one year, and would last indefinitely thereafter, until thirty days after the purchaser should give the notice required by the statute. As was said in California & N. R. R. Co. v. Mecartney, 104 Cal. 616, 28 Pac. 448: "It is provided (Pol. Code, sec. 3780) that a ²⁰⁰ redemption may be made within twelve months from the date of the purchase, or at any time prior to the filing of certain affidavits and the application for the deed. 'Or' may be read 'and,' for it is evident that all the recited events must happen before the owner will be deprived of his right to redeem." To change a right of redemption which lasts indefinitely until the performance by a third party of some act which may or may not be performed, to a right limited by the expiration of a definite period of time is a substantial change in the right. And while, under the amendments of

1895, the right of redemption does not end absolutely with the expiration of the five years, it does end, without any notice to the owner, as soon as the state sees fit to dispose of the land. Under the old law the owner could rest secure until he received notice of intention to apply for a deed. He then had thirty days in which to redeem. Under the new law his right of redemption could be cut off at any moment after the expiration of the statutory period, without any personal notification to him.

Again, the rights of the owner are injuriously affected in another respect if the amendment is permitted to operate on past sales. Under the old law, not only does his right to redeem continue until after he has received the statutory notice, but no deed can issue to the purchaser until such notice has been given. By the amendment, the state receives its deed at once on the expiration of the five years. Such deed, when duly acknowledged or proved, is primary evidence of the regularity of the assessment, of the equalization, of the levy of taxes, of the nonpayment of taxes, of the sale, of nonredemption, of the execution of the deed by the proper officer, and is conclusive evidence of the regularity of all other proceedings from the assessment to the execution of the deed: Pol. Code, secs. 3786, 3787. Furthermore, such deed transfers to the state "the absolute title to the property described therein": Pol. Code, sec. 3787. It is not necessary here to decide whether or not the legislature has the power to alter the rules as to burden of proof of facts recited in deeds already executed—a question on which the authorities are in conflict: See *Strode v. Washer*, 17 Or. 50, 16 Pac. 926; *Smith v. Cleveland*, 17 Wis. 556; *Marx v. Hanthorn*, 30 Fed. 579; *Tracy v. Reed*, 13 Saw. 622, 38 Fed. 69, 2 L. R. A. 773; cf. *Emeric v. Alvarado*, 90 Cal. 444, 37 Pac. 356. But certainly there can be ²⁰⁷ no doubt that there is a material distinction between the position of a delinquent taxpayer before a deed divesting his title and having the probative force given by sections 3786 and 3787 has been executed, and his position after the execution of such deed, even though a right of redemption may remain in him for a time. And the conclusion follows that a law which authorizes the making of a deed at a fixed time, where, under the law in force at the date of sale, a deed could not be made until thirty days after the giving of notice by the purchaser, is a change which affects

the substance of the owner's right, rather than one which goes merely to the remedy.

There is a marked distinction between this case and Oullahan v. Sweeney, 79 Cal. 537, 12 Am. St. Rep. 172, 21 Pac. 960, relied on by the appellant. In that case there had been a tax sale under a law which allowed a fixed period of time for redemption. After the sale the law (Pol. Code, sec. 3785) was amended by the insertion of the provision above discussed requiring the purchaser to give thirty days' notice of his intention to apply for a deed, and extending the time for redemption until such notice was given. The court held, following Curtis v. Whitney, 13 Wall. 68, 20 L. ed. 513, that this amendment was effective as to all applications for deeds made after the amendment. The ground upon which this was put was that it did not, as against the purchaser, extend the time for redemption. Such purchaser could still obtain his deed at the expiration of twelve months, provided he took the steps required by the statute. It rested entirely with him whether or not he chose to take these steps. It is argued that the case at bar is the converse of the Oullahan case (79 Cal. 537, 12 Am. St. Rep. 172, 21 Pac. 960); that if it be not an invasion of the purchaser's right to require him to give thirty days' notice in order to cut off the right of redemption, it is no invasion of the owner's right to take away the provision of notice. But the cases are not analogous. As was stated by this court in Allen v. Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646, in speaking of the ruling in Oullahan v. Sweeney, 79 Cal. 537, 12 Am. St. Rep. 172, 21 Pac. 960: "This requirement (i. e., that of notice) was a mere incident to the right of the purchaser to receive a deed; it merely prescribed the manner in which he should proceed to demand the deed to which he was entitled." There was, as to him, simply a change in the procedure which he must follow in order to get ²⁰⁸ his deed. But the situation of the owner, who is deprived of the notice, is different. Under the law as it stood at the date of sale he had thirty days after the service of notice in which to redeem, and during these thirty days he was the owner of the land, subject only to the lien of the state for taxes. After the amendment dispensing with the requirement of notice, his right of redemption ended, without notice to him, at a time very different from, and possibly earlier than, the time when it would have

expired under the old law. And, as has been pointed out, his title was divested at the expiration of a fixed, instead of an indefinite, period. That these circumstances worked a substantial change in the rights which the owner had at the date of the sale seems clear.

Inasmuch as the plaintiff failed to prove the giving of the required notice, neither deed operated to convey W. H. Johnson's title to the state, and all of the instruments offered by plaintiff were properly excluded. This disposes of the appeal from the order denying a new trial.

On the appeal from the judgment it is urged that the court erred in granting to the defendants the affirmative relief asked by them in their cross-complaints. This contention is based on the view, expressed several times by this court, that in an action to quiet title a cross-complaint by a defendant who claims title in himself is not necessary: *Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637. If these cases have not been overruled, their authority has, as to the point under discussion, been seriously impaired by *Islais etc. Water Co. v. Allen*, 132 Cal. 432, 64 Pac. 713. Furthermore, no objection seems to have been raised in the court below to the mode of pleading. The plaintiff did not attack the cross-complaints either by demurrer or by motion to strike out. He answered and went to trial on the merits. Under these circumstances we think he should be held to have consented to the method of procedure which was followed, and that he cannot now be heard to make this objection, even if it could be conceded that there is any merit in the objection itself.

The judgment and order appealed from are affirmed.

Angellotti, J., and Shaw, J., concurred.

After a Sale has been Made for Delinquent Taxes, it has been affirmed that the legislature cannot amend the law so as to impose more onerous conditions on the right of redemption than existed at the date of the sale: *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194. But see *Gage v. Stewart*, 127 Ill. 207, 11 Am. St. Rep. 116; *Oullahan v. Sweeney*, 79 Cal. 537, 12 Am. St. Rep. 172. The constitutionality of statutes extending the time to redeem from judicial sales is discussed in *State v. Sears*, 54 Am. St. Rep. 808, and in the recent case of *Welch v. Cross*, 146 Cal. 621, 106 Am. St. Rep. 63.

CUMMINGS v. STROBRIDGE LAND SYNDICATE.

[150 Cal. 209, 88 Pac. 900.]

GUARDIAN AND WARD—Mortgage by Former to Latter and Release of Without Order of Court.—If a guardian borrows or embezzles funds of his ward, then only one year old, and subsequently, for the purpose of borrowing more money, enters a satisfaction of such mortgage, signing the ward's name by himself as guardian, and receives from the second mortgagee money sufficient to pay the debt of the ward, and afterward sells the property to innocent purchasers, the money received by the guardian, whether from such second mortgagee or such purchaser, must to the extent necessary be deemed the money of the ward, and operates to discharge the mortgage to him, though the guardian subsequently embezzles it, and the ward is not entitled to foreclose his mortgage. (pp. 192, 193.)

John S. Chapman, Johnston & Jones, Stanton L. Carter, Platt & Bayne and H. H. Welsh, for the appellants.

Coldwell & Borland and N. C. Coldwell, for the respondent.

210 HENSHAW, J. This is an action to foreclose a mortgage alleged to have been given by the defendant Sayle to plaintiff on the fifteenth day of November, 1881, to secure the payment of a promissory note made by Sayle at the same date. The amount of the promissory note was two thousand dollars. A trial was had, resulting in judgment for plaintiff in the sum of sixteen thousand four hundred and eighty dollars and fifty cents, and for a decree of the sale of the mortgaged premises. The motion for a new trial was denied, and certain of the defendants appeal from the judgment and from the order denying their motion. The salient facts of the case are these: Sayle, who was a practicing lawyer, married the mother of the plaintiff, who was then an infant about a year old. He was appointed guardian of the person and estate of the infant, and there came into his possession as such guardian of the estate the sum of two thousand dollars. He continued to act as guardian, and the court finds that he remained such guardian until the sixteenth day of May, 1901, at which time the child attained its majority; but in fact there was never any settlement of Sayle's account as guardian, nor was there ever anything done in reference to the guardianship, **211** and he was never discharged. Immediately upon, or shortly after, receiving this two thousand dollars belonging to his infant ward, Sayle, who was the leading witness for the

plaintiff, declares that he "borrowed" the money. The fact appears to be that he appropriated it to his own use without any order of court—in brief, embezzled it. He testifies he made a promissory note to his ward, then about a year and a half old, in the sum of two thousand dollars, and executed a mortgage upon land which he owned, securing this note. He filed the mortgage with the county recorder of Fresno county, where the land was situated, and paid the fees for the filing, and delivered the promissory note to his wife, who was the mother of the plaintiff. None of these transactions, it is perhaps needless to say—neither the "borrowing" of the ward's money, nor the giving of the note and mortgage—was done by the authority of, or had the sanction of, the court. About a year afterward, desiring to borrow more money, he caused to be entered upon the margin of the record an acknowledgment of full payment and satisfaction of the mortgage and the debt thereby secured, signing it "Ralph Wardlaw Cummings, by C. G. Sayle, his duly acting and qualified guardian." This was signed and acknowledged by him on the 24th of October, 1882. Upon the same day that this release was made he gave a note and mortgage to one Baird for two thousand dollars, and received the money therefor. He says that he did not receive the two thousand dollars in gold coin from Baird on that day for Ralph Cummings, and he did not receive the two thousand dollars on that day to satisfy the mortgage; that he received it a few days afterward from Mr. Baird. He did not tell Mr. Baird when he borrowed the money that it was the boy's; that he was doing it as part of the business of the plaintiff. He did tell Mr. Baird, when asked if he had put anything on the property, that he had put a two thousand dollar mortgage on it in favor of his boy, and told him also that he could control it, and that it would not bother his mortgage, if he would let him have the money and let his mortgage go on record. Baird only agreed to let him have the money upon his acknowledgment of payment and satisfaction of the mortgage to Ralph Cummings. Baird refused to have a second mortgage, and his mortgage was taken as a first mortgage, upon condition²¹² of the payment and satisfaction of the mortgage already on the property. He had intended to replace the canceled mortgage of his ward by placing a second mortgage upon the same property in favor of the ward. He did not, however, do this. Years afterward he made another mortgage to the ward upon

another piece of property, to secure the same indebtedness. A satisfaction of the Baird mortgage was entered on March 13, 1884, and on the same day Sayle mortgaged the same land to the predecessor in interest of defendant, Mary J. Blasingame, for three thousand dollars. Subsequent to these transactions he sold the land in parcels to different purchasers for its full value; that is to say, there was never any reduction of the purchase price because of the existence, or supposed existence, of any mortgage upon the property in favor of the plaintiff. The years passed and the ward grew to the age of majority. During this time he lived with his stepfather and was supported by him. There has never been any settlement of guardianship accounts, and it has never been determined whether Sayle is indebted to his ward, or whether, upon the other hand, the ward's estate is liable to him. Sayle filed a verified petition in insolvency during the ward's minority and made no mention of the mortgage which in this action is claimed to be subsisting and in full force against the property. The mortgage note, indeed, is not produced. Sayle explains that this was carelessly burned by him in the destruction of some worthless papers when he was changing his law office. The plaintiff himself is not a witness in the case to testify as to any of these matters; as, for example, whether or not there was any sum due him from his guardian, because manifestly, if his guardian had in fact settled with him for this money so borrowed twenty and more years ago, equity would not permit the enforcement of the mortgage. And, more than this, not only is the plaintiff not a witness, but the suit seems to have been instigated and brought by his mother and stepfather. Thus, Mrs. Sayle, wife of Sayle, testifying as to a certain fact, says that she discovered it "in San Francisco when I started this suit." Many more circumstances could be pointed out, but these are sufficient to show that the action, while appealing to the equitable side of the court for the enforcement of a ward's rights, is one wholly without equity. The contention of plaintiff is that the guardian ²¹³ had no power or authority, without the order of a court, to have released the mortgage, and that the mortgage stands as a valid and subsisting lien upon the property; that while it is true that the purchasers paid full price for the property, and that upon the record the mortgage to plaintiff had been released, yet these facts are not sufficient in defense, because they were put upon notice that the guardian could

not release the mortgage except upon payment of the money and order of court. This was the view which the trial court adopted, and judgment passed for plaintiff accordingly.

Some interesting questions are here presented, the determination of which would unquestionably prove extremely embarrassing to plaintiff's case. Thus, plaintiff begins his proofs with a showing of this borrowed money by his guardian and the making of the so-called note and mortgage to him—the ward. But a note and mortgage, to be of any validity whatsoever, must be legal contracts, and to every contract there must be two parties. An infant of a year old is plainly incapable of contracting, and it may be seriously doubted, under the circumstances here disclosed, with the additional fact that one of the contracting parties stood in the confidential relation of guardian to the other, whether any contract could be said to exist at all. Certainly if Sayle had been indicted for embezzlement, his declaration that he had borrowed the money from his ward, and by contract had given a note and mortgage to an infant, of the tender age of one year, would scarcely be held to fill the measure of a valid defense. But aside from this and other like questions with which the case abounds, one proposition is determinative of the matter, and upon it this decision may rest. Assuming or conceding that the note and mortgage as given to the ward were valid so as to encumber the land, assuming also and conceding that the release of this mortgage was without authority of the court, conceding also that the witness Sayle does endeavor, though shufflingly and evasively, to have it appear that he did not pay over to his ward the money which he received from the Baird mortgage, the fact remains that equity itself, under such circumstances as those here disclosed, makes such payment in pursuance of its maxim that it will regard as done that which ought to have been done. When the money for the release of this mortgage came into Sayle's hands it²¹⁴ was, in equity, the ward's money, and any improper use which Sayle thereafter made of it was but a second embezzlement of the ward's funds. So, too, as to the innocent purchasers—the defendants here—who paid full value for their property. If they, in honest ignorance of the situation, paid full value for property which, so far as the record went, was clear of any encumbrance to this minor ward, and if in fact the ward had some undisclosed lien upon the property, so much of the moneys that these purchasers paid as might be

necessary to clear this lien was taken by the guardian as money of the ward, and if the guardian thereafter made further misappropriation of it, the purchasers are protected against its consequences. This principle is plainly and elaborately enunciated in *Hadley v. Chapin*, 11 Paige Ch. 245, and if many more cases enunciating the same principle may not be cited, it may be said that few have had the temerity to maintain actions such as the one at bar, and that no cases can be found upholding a contrary doctrine.

It becomes unnecessary to consider the many other objections advanced by appellants, both to the rulings of the court in admitting and rejecting evidence and to the sufficiency of the evidence to sustain the judgment, because the proposition which we have enunciated is determinative of the case, for which reason the judgment and order appealed from are reversed as to all of the appealing defendants.

McFarland, J., and Lorigan, J., concurred.

The Powers of Guardians in dealing with the funds and estates of their wards are discussed in the note to *Schmidt v. Shaver*, 89 Am. St. Rep. 257.

BUILDERS' SUPPLY DEPOT v. O'CONNOR.

[150 Cal. 265, 88 Pac. 982.]

MECHANICS' LIENS.—Subcontractors are not Entitled to a Personal Judgment Against the Land Owner in a suit to enforce their claim against the land. (p. 194.)

MECHANICS' LIENS—Offsets.—In an Action by Subcontractors to enforce a mechanic's lien, damages for the failure of the original contractor to finish his work within the time specified in his contract may be deducted notwithstanding a statute providing that "as to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim in favor of the reputed owner and against the contractor." This clause relates to offsets not arising under the terms of the contract and as to which, from an inspection of the contract, materialmen and laborers could have no notice. (pp. 194, 195.)

MECHANICS' LIENS—Constitutional Law.—A Statute Allowing Attorneys' Fees in suits to foreclose mechanics' liens is unconstitutional and void when they are allowable in favor of plaintiffs only, and not allowable to them in other classes of actions. (p. 195.)

Mullany, Grant & Cushing, for the appellants.

Barna McKinne, Wal. J. Tuska and Maurice L. Asher, for the respondents.

267 MCFARLAND, J. Three mechanic's lien cases were consolidated and tried together, and judgment was rendered against Dennis O'Connor and Mary O'Connor, the owners of the land involved, who appeal from the judgment.

The judgment must be reversed for the following reasons: 1. The actions were not brought by the original contractor; they were all brought for material and labor furnished by plaintiffs as subcontractors. Nevertheless personal judgments were rendered against the appellants. This was error. as plaintiffs were entitled only to enforce their claims against the land.

2. There was a written contract between appellants as owners of the land and the contractors, Barth and Scarf, for the construction of a certain building thereon. This contract was regular in form and was recorded as provided by the code, and it is admitted that the rights of all parties rest on said contract, the contract providing that the building was to be built for seven thousand five hundred dollars and to be finished in five months—and if not finished within the five months the owners were to be allowed whatever damages the delay should cause. The building was not finished until about two and a half months after the stipulated time; and appellants averred and offered evidence to prove that they were damaged by the delay in the sum of three hundred and fifty-nine dollars and fifty cents. Respondents objected to this evidence, and the court sustained the objection upon the ground that appellants could not avail themselves of the damage, even if proved, because of a clause in section 1184 of the Code of Civil Procedure that "As to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner and against the contractor." But it was definitely settled in *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200, that damages for failure of the contractor to finish the work within the time specified in the written contract may be deducted by the owners as against lienholders, and that "the clause has reference, in the first place, to offsets not arising under the terms **268** of the contract, and as to which, from an inspection of the contract, materialmen and laborers could have no notice." The opinion in that case is quite full on the point, and we need not further discuss it here. The appellants were, therefore, entitled to deduct from the amount of the money remaining in their

hands whatever damages they suffered for the delay in finishing the building, and the court erred in refusing to allow them to introduce evidence of such damage.

3. The court allowed an attorney's fee in each of the cases, and appellants contend that such allowance was erroneous because the statutory provision directing the allowance of such a fee is unconstitutional and void. In our opinion this contention must be sustained. In a few instances this court has affirmed judgments for plaintiffs in mechanic's lien cases which included attorney's fees; but our attention has not been called to any case where the question of the constitutionality of the statute providing for such fees has been raised, or presented to the court for adjudication. In the case at bar the question has been for the first time raised.

The statutory provision in question is found in section 1195 of the Code of Civil Procedure, and is as follows: "The court must also allow, as a part of the costs, . . . reasonable attorneys' fees . . . to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant." It is to be noticed that this section provides for an attorney's fee to plaintiff but not to defendant, even though the latter be successful in the action; and that attorneys' fees are allowed even to plaintiff only in actions under the mechanic's lien law—the general rule being that "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties": Code Civ. Proc., sec. 1021. This provision is in our opinion violative both of the federal and the state constitution—of the fourteenth amendment of the former, which guarantees to every person "the equal protection of the law," and of the provisions of the state constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions²⁶⁹ where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed.

That said law is violative of the fourteenth amendment to the federal constitution was established by the supreme court of the United States in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 266. In that case the

statute of the state of Texas allowing attorney's fee to any person having a bona fide claim against a railroad company for services, or for damages, or for stock killed, was held to be unconstitutional because violative of the said fourteenth amendment. The court, speaking of the statute, said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong. They do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In the decisions of several states a statute similar to the one involved has been held unconstitutional. The question is elaborately discussed by the supreme court of Colorado in *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354, 48 L. R. A. 340, and a statute of that state similar to ours declared void. The opinion rendered in the case is an exhaustive one, and we will make only a few quotations from it. After stating the statutory provisions the court says: "It will be seen that this section imposes a penalty upon the defendant for ²⁷⁰ exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorney's fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious." And the court further says: "We are unable to perceive any reason why, in actions to enforce their claims for merchandise or material furnished in the erection of a house or for the development of a mining claim, they should be afforded any other

or greater rights than are given other merchants who furnish provisions or supplies to persons for family consumption, or that their debtors should not have the same right to contest the justice of their claims upon the same terms and conditions as are afforded to other debtors by the general law of the land. It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts because the very purpose of the litigation he invokes is to determine whether he owes the debt or not. And it is immaterial whether he successfully defeats the larger part of the claim. He may, nevertheless, be mulcted in a sum which will deprive him of any benefit from the defense which he has legitimately established. It is also equally immaterial whether he interposes a vexatious defense or makes an honest though unsuccessful one, or allows judgment to be taken against him by default; he is subjected to the same penalty." Many cases are cited which sustain the opinion. This case was afterward expressly approved by the courts of Colorado: See *Perkins v. Boyd*, 16 Colo. App. 266, 65 Pac. 350, and cases there cited.

In *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325, the supreme court of Kansas held unconstitutional a clause of a Kansas statute as follows: "In any action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action." It will be observed that in this statute the special advantage is given only to the "artisan or day laborer," and not to materialmen, who constitute the main lien claimants in California; but the provision was, nevertheless, held void. The court says: "Under the constitution of the ²⁷¹ state of Kansas, artisan and owner, contractor and laborer, are each one possessed of equal and inalienable rights to life, liberty, and the pursuit of happiness. . . . The burden of the law upon them should be as equal and impartial as the law of gravitation, and yet, in the baldest and most arbitrary manner imaginable, this act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others"; and then follows a quotation from the case of *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 266, above noticed.

In *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263, 29 L. R. A. 386, the supreme court of Ohio held unconstitutional a statute providing that in an action for wages the plaintiff should recover an attorney's fee. The court said: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law." And further the court say: "Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property."

In *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006, the supreme court of Michigan held that a statute authorizing an attorney's fee to be taxed to the party in a judgment for personal services was unconstitutional—being an attempt to give special advantages to one class at the expense of another.

In *Wilder v. Chicago & W. M. Ry. Co.*, 70 Mich. 382, 38 N. W. 289, the supreme court of Michigan held that an act authorizing an attorney's fee against a railroad company in an action for injury to stock was unconstitutional and void. In *Openshaw v. Halfin*, 24 Utah, 426, 91 Am. St. Rep. 796, 68 Pac. 138, the supreme court of Utah held that a statute allowing attorneys' ²⁷² fees to plaintiff in an action to compel the release of a mortgage was unconstitutional as special legislation, and violative of the constitutional principle of equal protection to all: See, also, *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500.

In the opinions rendered in the cases above noticed there are many citations of authorities sustaining the opinions; but we have been unable to verify these citations on account of the difficulty of access to books since the recent destruction here by fire of law libraries. We are satisfied with the reasoning on the point in the cases which we have cited and quoted from, and deem it unnecessary to discuss the matter further.

Upon the three grounds above stated the judgment must be reversed.

Appellants also make the contention that the court erred in allowing plaintiffs as costs the expense of filing their liens, upon the ground that the statute providing therefor is unconstitutional; but in our opinion this contention is not maintainable. The constitution imposes upon the legislature the duty of providing for these liens; and as the filing of the liens is part of the legislative method of perfecting them, we think that the small expense of such filing is properly included in the phrase "costs and disbursements."

The judgment is reversed and the cause remanded for a new trial.

Henshaw, J., and Lorigan, J., concurred.

Hearing in bank denied.

The Opinion Expressed in the Principal Case respecting the unconstitutionality of that part of the statute authorizing the allowance of attorneys' fees was followed and reaffirmed in *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1088.

Mechanics and Materialmen furnishing labor or materials for a building at the request of the contractor are given a lien on the building which cannot be defeated by his misconduct: *Berger v. Turnblad*, 98 Minn. 163, 116 Am. St. Rep. 353.

A Statute Allowing Attorney Fees to the plaintiff in proceedings to enforce a mechanic's lien which result in a judgment in his favor is constitutional: *Dell v. Marvin*, 41 Fla. 221, 79 Am. St. Rep. 171, and note. A contrary view, however, seems to prevail in Colorado: *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49.

TITLE AND DOCUMENT RESTORATION COMPANY v. KERRIGAN.

[150 Cal. 289, 88 Pac. 356.]

CONSTITUTIONAL LAW—Character of a Proceeding not Changed by Its Name.—The mere title or designation given by the legislature to a proceeding cannot change its substantial character nor alter the rights of the parties to it. (p. 207.)

A PROCEEDING is Quasi in Rem when its purpose is to affect the interest of the defendant in specific real property within the state which has at the outset of the proceeding been brought within the control of the court. (p. 208.)

CONSTITUTIONAL LAW—Due Process—Substituted Service. As to proceedings quasi in rem the requirement of due process is satisfied by a substituted service of summons, at least as to known and designated defendants who cannot be found within the state. (p. 208.)

CHANCERY, Jurisdiction of may be Extended Beyond Action in Personam.—Though in the exercise of its inherent equity jurisdiction a court of chancery acts only in personam, the legislature may, so far as the constitutional provision regarding due process of law is concerned, confer upon such courts a jurisdiction which shall, as to property within the state, operate upon it in some other way than merely directing the defendants to do or refrain from doing some act concerning the property. The state has power to enact statutes under which the interests of persons in property within the state shall be affected so far as that property is concerned, though not personally served with process within the state. (p. 209.)

CHANCERY—Jurisdiction of to Quiet Title.—Courts of chancery may by statute be authorized to quiet title to property in the state without the personal service of process therein. (p. 209.)

QUIETING TITLE, Operation of Decree in Rem.—While a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent partakes of the nature of a judgment in rem. (pp. 210, 211.)

JURISDICTION, Naming of Defendants not Essential to.—It is not essential, in a statute quieting or establishing title, that any person be required to be named as a defendant in the title to the action. (pp. 212, 213.)

JUDGMENTS IN REM Need not Give Claimants Further Time to Assert Their Rights.—It is not essential under the constitutions in force in the United States to the cutting off of unnamed persons by a judicial proceeding, that the adjudication against them be made final only upon their failure to come in and assert their rights within a specified time after the entry of the judgment or decree. (p. 213.)

DUE PROCESS OF LAW, Changes in.—The forms of procedure in common use at the times of the adoption of the various American constitutions must be taken to have been understood by the framers as embraced within the term "due process of law," but in prohibiting the taking of life, liberty, or property without due process of law, those who adopted these constitutions did not intend to provide that the details of practice and procedure then existing should forever remain unchanged. The legislature may devise entirely novel and unprecedented methods of procedure, provided they afford the parties affected the substantial securities against arbitrary and unjust spoliation which are embraced within the system of jurisprudence prevailing throughout the land. (p. 213.)

CONSTITUTIONAL LAW—Unknown Claimants.—The power of the state to settle titles is not limited to settling them against persons named. To exercise this power to the fullest extent it is necessary that it should be made to operate on all interests, known and unknown. (p. 214.)

CONSTITUTIONAL LAW—Unknown Claimants, Who may be Proceeded Against as.—So far as substituted service of process upon a class of unknown claimants is permitted to all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity; but this necessity will not justify the omission of personal service upon all who can with reasonable diligence be ascertained and found. (p. 217.)

SUITS TO DETERMINE TITLE, Diligence to Ascertain and Serve Known Claimants, When Required.—If the evident purpose of a statute is to secure, as far as possible, actual notice of the proceeding thereunder to all known claimants, it must be construed as not intending to permit plaintiff to willfully or negligently close his eyes to means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. (p. 218.)

CONSTITUTIONAL LAW—Establishing Title, Proceeding for. When Judicial.—A proceeding for the establishment of title to real property, though no person is required to be named as a defendant and no allegation need be made that anyone denies or assails plaintiff's title, there being, however, a provision for notice to all persons interested in opposing plaintiff's application and an opportunity for them to come in and oppose it, is not so nonjudicial in character that jurisdiction over it may not be conferred on a court forbidden by the constitution to exercise other than judicial functions. (p. 219.)

COURTS, Jurisdiction of to Quiet Title.—If a title to real property is in fact good, but is not deducible of record, a court of equity may remedy such defect by a decree, although there is no absolute controversy as to the title. (p. 220.)

CONSTITUTIONAL LAW—Special Legislation—Permissible Classification.—The establishment and quieting of title to real property in case of the loss or destruction of public records by earthquake, fire or flood differs so materially from most actions as to justify the legislature in placing the proceeding in a class by itself and in adopting for it forms of proceeding and modes of serving process not permitted in other actions. (p. 224.)

CONSTITUTIONAL LAW—Classification, Special, When Sustainable.—The question of classification is primarily for the legislature. The court is not to set aside a statute merely because in its view it may have been unwise or unnecessary to apply certain rules to one class of cases. Before an act can be declared invalid on this ground, it must appear to the court that there was no reasonable basis on which the peculiar legislative provision could be made. (p. 225.)

CONSTITUTIONAL LAW—Title of Statute.—The title, "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records," complies with the constitutional provision that "every act shall embrace but one subject, which shall be expressed in its title," and under this title provision may be made for a proceeding to establish and quiet the title to real property in all cases of the loss or destruction of public records by fire, flood, or earthquake, without naming any person as defendant, and though there is no assault upon or dispute respecting the title, and also providing for modes of procedure and means of serving process not provided for in other actions. (p. 226.)

Garret W. McEnerney, Walter Rothchild, Joseph H. Mayer, Joseph Hutchinson, James S. Hutchinson, Charles S. Wheeler, J. F. Bowie, Van Fleet & Mastick, William H. H. Hart and Bishop & Hoefler, for the petitioner.

Gaillard Stoney, John J. Lermen, John Garber, Page, McCutchen & Knight, A. E. Bolton, C. S. Farquar and William B. Beaizley, for the respondent.

301 SLOSS, J. In June, 1906, the legislature of this state, having been convened in extraordinary session to legislate concerning certain needs developed by the disaster of April 18, 1906, enacted, among other statutes, one entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records."

The present proceeding is an application for a writ of mandate. The petitioner herein filed a complaint, as provided by the act above referred to, and applied to the respondent, judge of the superior court in which its complaint had been filed, for an order for publication of summons. The respondent declined to make the order upon the ground that the act in question violated certain provisions of both the federal and state constitutions. The purpose of this proceeding being to compel the judge of the lower court to make the order for publication, as requested, the real, and substantially the only, question herein involved is whether or not the above-mentioned act is a valid exercise of legislative power. The facts alleged in the petition are not denied, and the matter now comes before the court upon a demurrer to the petition. In order to properly state and discuss the constitutional points made in support of the demurrer, it will be well to give a somewhat full statement of the provisions of the act in question.

302 The act provides that whenever the public records in the office of a county recorder are lost or destroyed, in whole or in any material part, by flood, fire, or earthquake, any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person in the actual and peaceable possession of, any real property in such county, may bring and maintain "an action in rem against all the world" in the superior court of the county where the land is situate "to establish his title to such property and to determine all adverse claims thereto": Sec. 1. The action is commenced by the filing of a verified complaint in which the party commencing the same is named as plaintiff, and the defendants are described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The complaint is to contain a statement of the facts enumerated in section 1 of the act, together with a particular description of the real property, and a specification of the estate or interest of the plaintiff therein: Sec. 2. The

act provides for the issuing of a summons upon the filing of the complaint. The summons is directed to "all persons claiming an interest in or lien upon the real property herein described, or any part thereof," and requires them to appear within three months after the first publication of the summons, and to set forth what interest or lien, if any, they have upon the real property in question, a description of which is to be contained in the summons. At the time of the filing of the complaint the plaintiff must file with the same his affidavit fully and explicitly setting forth and showing: 1. The character of his interest, the duration of its existence, and from whom it was obtained; 2. Whether or not he has ever made any conveyance affecting the property, and if so, when and to whom, and a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; 3. That he does not know and has never been informed of any other person who claims or may claim any interest in or lien upon the property adversely to him, or if he does know and has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state one or more of the matters required, he shall set forth and show fully and explicitly the reasons for such inability. This affidavit is ¹⁰³ made to constitute a part of the judgment-roll: Sec. 5. The summons is required to be published in a newspaper of general circulation published in the county in which the action is brought, the particular newspaper to be designated by an order of the court or a judge thereof. The summons is to be published at least once a week for a period of two months and to each publication there must be appended a memorandum giving the date of the first publication of the summons. There must also be appended to the summons a memorandum giving the names of any persons who are known to the plaintiff to claim any interest in the property adversely to the plaintiff, if the names of such persons appear in the affidavit filed with the complaint: Sec. 4. If the affidavit discloses the name of any person claiming any interest adversely to the plaintiffs, the summons must be personally served upon such person, if he can be found within the state, together with a copy of the complaint and a copy of the affidavit and memorandum provided for in section 4, and if the person disclosed by the affidavit resides out of the state, a copy of the summons, memorandum, complaint, and affidavit must be sent to him by mail within fifteen days

after the first publication of the summons. If he resides within the state and cannot with due diligence be found therein before the expiration of the period of the publication of summons, then the copies shall be mailed to him forthwith upon the expiration of the period of publication: Sec. 6. In addition to the service by publication and the personal service and mailing above spoken of, the act provides that a copy of the summons and of the memoranda referred to shall be posted in a conspicuous place on each separate parcel of the property described in the complaint within fifteen days after the first publication of the summons: Sec. 4. Upon the completion of the publication and posting of the summons and its service upon and mailing to the persons, if any, upon whom it is directed to be personally served, "the court shall have full and complete jurisdiction over the plaintiff and the said property and of the person of everyone having or claiming any estate, right, title or interest in or to, or lien upon, said property or any part thereof, and shall be deemed to have obtained the possession and control of such property ⁸⁰⁴ for the purposes of the action and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act": Sec. 7. Any person having, or claiming any estate, right, title, or interest in, or lien upon, the property may at any time within three months from the first publication of the summons appear and make himself a party to the action by pleading to the complaint by a verified answer setting forth the estate or interest claimed: Sec. 8. The plaintiff and every defendant claiming any affirmative relief must at the time of filing his pleading record in the office of the recorder a notice of the pendency of the action containing a particular description of the property affected, and this notice is to be recorded in a book devoted exclusively to the recordation of said notices, and is to be entered upon a map of the land, to be kept by the recorder for that purpose, with a reference to the date, book, and page of the record of such notice: Sec. 9. No judgment is to be given by default, but the court must require proof of the facts alleged in the pleadings: Sec. 10. The judgment when given "shall ascertain and determine all of the estate, rights, title, interests and claims in and to said property, and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consists of mortgages or liens of any description, and shall be binding

and conclusive upon every person who at the time of the commencement of the action had or claimed any estate, right, title or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." A certified copy of the judgment is to be recorded in the office of the recorder: Sec. 11. All provisions and rules of law relating to evidence, pleading, practice, new trial, and appeal applicable to other civil actions are, except as otherwise provided in the act, made applicable to this action: Sec. 12. The act provides that where one judgment under it has been entered as to any real property, no other action relative to the same property shall be tried until proof is first made to the court that all persons who appeared in the first action have been served with the papers in the new action, at least a month before the expiration of the time to plead: Sec. 14. Executors, ³⁰⁵ administrators, guardians, or other persons holding the possession of property in the right of another may maintain the action as plaintiff, or appear and defend: Sec. 15. The remedies provided for by the act are to be deemed cumulative and in addition to any other remedy now or hereafter provided by law for quieting or establishing the title to real property: Sec. 17. All actions authorized by the act must be commenced before July 1, 1909: Sec. 18.

The general purpose of the statute is plain. It was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make it impossible to trace a record title may secure a decree which shall furnish a publicly authenticated evidence of title. It is hardly necessary to point out that under the system of registration of land titles which has grown up in all of the states of this Union it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice (whether or not the record remains in actual existence), the registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable. It is of course true that for many centuries lands have been transferred in England, whence we have, in the main, derived our system of real property law, without any considerable

resort to a public recording scheme. But in this country the system of registration has become so completely established that the courts can take judicial notice of the fact that in the great majority of cases parties dealing in real estate rely for the proof of their titles upon the chain of title that will be disclosed by an examination of the records, and in a small degree, if at all, upon the possession of the original instruments composing that chain. In many instances, indeed, these instruments are not preserved for any great length of time.

It is also matter of common knowledge that in the city and county of San Francisco at least, if not in other counties, the disaster of April last worked so great a destruction of the ³⁰⁶ public records as to make it impossible to trace any title with completeness or certainty. That some provision was necessary to enable the holders and owners of real estate in this city to secure to themselves such evidence of title as would enable them not only to defend their possession, but to enjoy and exercise the equally important right of disposition, is clear. These considerations are suggested not with a view to arguing that the necessity for some act of this kind affords any ground for disregarding constitutional provisions, if the statute be found to conflict with such provisions, but rather as a guide to determine the real scope and purpose of the act, and to emphasize the rule so often laid down by all the courts that in passing upon the constitutionality of an act of the legislature every presumption and intendment in favor of the validity of the enactment are to be given effect.

1: One of the principal objections made to the act is that by the decree persons who may have an interest in the land are deprived of their property without due process of law. This contention is based upon the proposition that the proceeding created by this statute is a proceeding in personam, and not in rem, and that in personal actions a binding judgment cannot be rendered against the persons to be affected without giving them personal notice of the proceeding and an opportunity to be heard. It is conceded by the learned counsel for respondent, as it needs must be, that if this is strictly a proceeding in rem, such personal notice is not required. Undoubtedly the act, so far as the language of the legislature can have this effect, attempted and intended to create a proceeding which should have the force and effect of a proceeding in rem. Section 1 describes the proceeding

as "an action in rem against all the world." Section 11 provides that the judgment shall be binding and conclusive upon every person who at the time of the commencement of the action had or claimed any estate, right, title or interest in or to the property.

It is, however, argued that if the proceeding is in its essential features one in personam, the legislature cannot, by merely designating it "in rem," cut off the rights of persons interested without providing as to them such notice and opportunity to be heard as are requisite to constitute due process in ³⁰⁷ personal actions. That the mere title or designation which is given by the legislature to a proceeding cannot change its substantial character or alter the rights of parties to it is, of course, plain enough. What, then, in its essential characteristics, is a proceeding in rem? If, as contended by respondent, it is one "to enforce a liability for which the res is liable, irrespective of who owns it—such a liability that the res can properly be impleaded as the respondent who is liable" (quoting the language of Loring, J., dissenting, in *Tyler v. Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433), the action provided for by the present statute does not come within the definition. But neither do some other proceedings conceded to be strictly in rem, such as the probate of wills, the distribution of estates, and the special proceeding created by section 1664 of the Code of Civil Procedure to "ascertain and declare the rights of all persons" to an estate. Even though, viewed as a matter of historical analogy, there may have been at common law no proceeding in rem which was at all similar to the one here provided, it may be asked why the state, in exercising its control over the ascertainment and settlement of the title to real estate within its borders, may not create a suit in rem, in which the court assumes control of the land, and which has as its primary purpose the settlement of such titles as to all the world. In substance—and the constitutional requirement of due process deals with substance rather than form—the action does not differ in character from the action to determine heirship (Code Civ. Proc., sec. 1664), which has always been regarded as a proceeding in rem (see *In re Blythe*, 110 Cal. 231, 234, 42 Pac. 643), and sufficient to bar the rights of all persons claiming as heirs of the decedent, whether or not they are named in the complaint or personally served with summons. It may be conceded, however, that apart from an ex-

pression of Chief Justice Holmes in *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, there is no authority directly supporting the proposition that a proceeding of the kind created by this act is strictly in rem. And we need not enter into a further discussion of the point, since we do not consider it necessary in this case to determine whether or not the action is one strictly in rem.

³⁰⁸ In any view the proceeding contemplated by the act is quasi in rem—that is to say, the purpose of the proceeding is not to establish an “infinite personal liability” against any defendant, but is merely to affect the interest of the defendant in specific real property within the state which has at the outset of the proceeding been brought within the control of the court. It is thoroughly well established that the constitutional requirement of due process is as to such actions satisfied by a substituted service of summons, at least as to known and designated defendants who cannot be found within the state. The most frequently cited authority upon the question of the power of a state to affect the interests of nonresidents by judgments rendered upon substituted service of summons is *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. In that case the court, speaking through Mr. Justice Field, said, regarding the question of jurisdiction in cases of service by publication: “Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. . . . It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants, but, in a larger and more general sense, the term is applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broad sense which we have mentioned.” Following the rules declared in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565,

it has universally been held that even in a purely personal action, where property within the state has been attached at the outset of a proceeding, the court may by publication of summons obtain jurisdiction to the extent of subjecting the attached property to the payment of the claim in suit.

³⁰⁹ The present proceeding has some of the characteristics of a suit to quiet title, a form of action well established as a branch of equity jurisdiction. While in the exercise of its inherent equity jurisdiction a court of chancery acts only in personam, it is no doubt competent for the legislature, so far as the constitutional provision regarding due process of law is concerned, to confer upon courts of equity a jurisdiction which shall, as to property situate within that state, operate upon it in some way other than by merely directing the defendants to do or refrain from doing some act concerning the property. The state has power to enact statutes under which the interests of persons in property within the state shall be affected so far as that property alone is concerned, and the action to quiet title, although originally under the old chancery practice merely a personal action against the defendant, may by statute be so extended as to permit the court to bind the interest of the defendant in the property, even though such defendant may not have been personally served with process within the state. *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. ed. 918, was a case involving the validity of a judgment obtained against a nonresident on publication of summons under statutes of Nebraska similar to our own (Code Civ. Proc., sec. 738 et seq.), authorizing persons claiming title to real estate to bring actions against any person or persons claiming an adverse estate or interest therein for the purpose of determining such estate or interest and quieting the title to said real estate. The court said: "But it is earnestly contended that no decree in such a case rendered on service by publication only is valid or can be recognized in the federal courts. . . . The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone. While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general

powers and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by a statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no³¹⁰ power to bring a nonresident into its courts for any purposes by publication, it is impotent to protect the titles to real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident would remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it.” And in *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51, this court, in applying the same rule to a similar case, said: “Unless the method of giving notice above prescribed (i. e., by publication under section 412 of the Code of Civil Procedure) is unreasonable or in conflict with some provision of the constitution or principle of natural justice, it cannot be held invalid. In determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. While a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment in rem.” There may be some expressions in the

opinion in *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, 28 L. ed. 101, which, on their face, conflict with the rule as declared in the two cases just cited. In *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. ed. 918, however, the court carefully explained the *Sansom* case, and ³¹¹ pointed out that that case had to do with the effect of a judgment obtained on publication of summons in a purely personal action. Similarly, in *Lynch v. Murphy*, 161 U. S. 247, 16 Sup. Ct. Rep. 523, 40 L. ed. 688, it was said: "The *Hart* case was explained in *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. ed. 918, in which last case it was held that the duty of determining unsettled questions respecting the title to real estate was local in its nature, to be discharged in such mode as might be provided by the state in which the land was situated, where such mode did not conflict with some special inhibition of the constitution and was not against natural justice; and we held that nothing inconsistent with this doctrine was decided in *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, 28 L. ed. 101": See, also, *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. Rep. 410, 44 L. ed. 520; *Bennett v. Fenton*, 41 Fed. 283, 10 L. R. A. 500; *Venable v. Dutch*, 37 Kan. 515, 1 Am. St. Rep. 260, 15 Pac. 520; *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693; *McLaughlin v. McCrory*, 55 Ark. 442, 29 Am. St. Rep. 56, 18 S. W. 762; *Harris v. Palmore*, 74 Ga. 273; *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4; *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962; *Sloane v. Martin*, 145 N. Y. 524, 45 Am. St. Rep. 630, 40 N. E. 217, 28 L. R. A. 347; *Roller v. Holly*, 13 Tex. Civ. App. 636, 35 S. W. 1074.

So far, then, as the procedure authorized by the act under discussion affects the rights of persons known and designated in the proceedings who could not, on account of nonresidence or for other sufficient reason, be personally served with summons within the state, it cannot, in view of these adjudications, be said that the service by posting, publication and mailing fell short of that due process of law which is applicable to this sort of proceeding. The objection that under the act no persons need be named as defendants in the title of the action does not appear to us to have any bearing upon the question of due process of law, so far as known claimants are concerned. The constitutional guaranty of due process requires that in actions of this character persons whose in-

terest in the land may be affected must be given such notice of the pendency of the proceeding and of the fact that their interests may be affected as is reasonable and appropriate to the nature of the case. If it be once conceded, as it must be, that such notice may, as to known claimants who cannot be personally served, be given by publication, we think it unimportant that the ³¹² person to whom such notice is given is not named in the caption of the complaint or the summons. The law requires him to be named in the affidavits and in the memoranda attached to the summons. If any notice whatever reaches such person, it will be, whether through the posting upon the premises, or the publication, or the service by mail, a notice which contains his name and advises him that his interest in the described property is involved in the proceeding, and that in order to defend such interest he must appear and plead within a given time. We see no reason why, so far as such designated claimants are concerned, the notice prescribed by the act does not satisfy every requisite of due process of law.

The principal contention upon this question of due process is that the act is unconstitutional in that it seeks to bar by the decree the rights of unknown owners, that is, those who are not alleged in the complaint or the affidavit to claim any interest in the property, and who cannot have any notice of the fact that their rights are involved other than the general notice given by the posting and the publication.

If by a substituted service of any sort a court may be given power to adjudicate the rights of unknown claimants in a proceeding of this character, it seems plain that the notice to such claimants here provided is sufficient. All substituted service must rest upon the ground of necessity, and, where it is permissible at all, it must be such as would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff and the relief sought, is posted upon the property, and is published in a newspaper for two months, and a *lis pendens* containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns the possible claimants who are not known to the plaintiff, the notice prescribed by the act is

as complete and full as, from the nature of the case, could reasonably be expected.

Indeed, the learned counsel for respondent, while they make some criticism upon details of the act regarding the notice, take their stand upon a broader proposition, and contend that in a proceeding which is not strictly in rem it is not within the ³¹³ power of the legislature to authorize on any form of process a decree which shall by its own force cut off the rights of persons not named or made parties to the proceeding. It is claimed that under the constitutions in force in American jurisdictions, the rights of unnamed persons who may claim an interest in real estate cannot be cut off by any judicial proceeding except by one which makes the adjudication against them final only upon their failure to come in and assert their rights within a specified time after the judgment or decree. In such proceeding the decree does not operate *ex proprio vigore*, but becomes the starting point of a statutory period of limitation, and the right is extinguished by failure to assert it within this period. In a way, the procedure thus outlined is analogous to the common-law fine, but because such method of accomplishing the result may have been the only one known to the common law, it does not follow that other methods may not be devised by the legislature without exceeding the limits of due process of law. No doubt the forms of procedure in common use at the time the constitutions were adopted must be taken to have been understood by the framers as embraced within the terms "due process of law." But in prohibiting the taking of life, liberty or property without due process of law, those who adopted these constitutions did not intend to provide that the details of practice and procedure then existing should forever remain unchanged. The legislature may provide entirely novel and unprecedented methods of procedure, provided that they afford the parties affected the substantial securities against arbitrary and unjust spoliation which are embraced within the system of jurisprudence prevailing throughout the land. "It follows," says the supreme court of the United States in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 28 L. ed. 232, "that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." It is not,

therefore, a sufficient objection to the action created by this statute to say that no precisely similar proceeding was known to the common law.

Applying the principles which have led the courts in cases like *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. ed. 918, and ³¹⁴ *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51, to sustain judgments quieting titles against nonresidents upon substituted service, why should not the legislature have power to give similar effect to such judgments against unknown claimants where the notice is reasonably full and complete? The validity of such judgments against known residents is based upon the ground that the state has power to provide for the determination of titles to real estate within its borders, and that as against nonresident defendants or others who cannot be served in the state, a substituted service is permissible, as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the state as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes, C. J., in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, in speaking of a statute which in the particular under discussion was similar to ours: "If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainty against the unknown may be said to be its chief end—and unknown claimants cannot be dealt with by personal service upon the claimant."

Proceedings not strictly in rem, but intended to have the effect of barring unknown claimants who are brought in only by publication, or other substituted service, are not entirely new in our legislation. Leaving out of consideration proceedings for the probate of wills, for distribution of estates, escheats, and tax cases and the special proceedings to determine heirship provided by section 1664 of the Code of Civil Procedure, all of which are claimed by respondent to be distinguishable from the case at bar in that, as claimed, they are proceedings strictly in rem, we find in our statutes, in sections 749 to 751 of the Code of Civil Procedure, enacted in 1901, a statutory action to determine adverse claims to

and clouds upon title to real property as against known defendants, and "also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described ³¹⁵ in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto." It is true that the constitutionality of these sections has not yet been passed upon by this court. But that the state may confer upon its courts jurisdiction to declare title to real property within the state to be vested in the plaintiff as against other claimants, known or unknown, upon substituted service, has been held by the courts of several states in well-considered cases. In *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773, the court upheld a statute authorizing an action to quiet title and determine adverse claims, and providing for including as defendants, in addition to persons appearing of record or known to have a claim to the lands in controversy, "also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein." Service was authorized to be made upon such unknown defendants by publication. A judgment obtained pursuant to the statute was held to bind persons not named in the complaint or personally served, the court saying: "The legislature may, in its discretion, provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court; and with a reasonable exercise of such legislative discretion the courts will not assume to interfere." This case was followed in *McClymond v. Noble*, 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838. In *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175, 57 L. R. A. 297, the court said: "It is now the settled doctrine of this court that the district courts of this state are clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all the known claimants within the jurisdiction of the court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest or claim thereto. The proceeding provided for by the act in question is such a one. It is substantially one in rem, the subject matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for

serving the summons and giving notice of the pendency of the proceedings are full ^{§16} and complete, and satisfy both the state and federal constitutions. To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet title to real estate by a decree binding all interests and all persons or parties, known or unknown." *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, was a proceeding brought to test the constitutionality of an act of the legislature of Massachusetts providing a method of land registration based upon the "Torrens system" so called. It was provided in the act that the decree for registration "shall bind the land and quiet title thereto," and "shall be conclusive upon and against all persons," whether named in the proceedings or not. The court held that the act did not violate the constitutional provisions as to due process of law. Chief Justice Holmes, who delivered the opinion of the court, expressed the view that the proceeding was one in rem in the most limited sense of the term. The majority of the court did not concur in this view, but did agree that whether or not the proceeding was strictly in rem, the requirement of due process was satisfied by giving to parties known, or who by reasonable effort could be known, notice by personal service or its equivalent, and to parties unknown notice by publication.

People v. Simon, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801, involved the validity of the act of 1897, establishing the "Torrens system" in Illinois. The law was upheld, and while the language of the opinion is not, perhaps, entirely clear, a careful reading of what was said on the point under discussion leads us to the conclusion that the court intended to hold, and did hold, that there was no violation of the constitution in the provisions of the act, coupled with those of the general law of Illinois, authorizing service by publication as against unknown owners and non-residents.

It is not to be denied that authority, and that of a high character, is cited in opposition to the views just expressed. The opinion of Justice Loring, dissenting, in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, and that of Vice-Chancellor Stevens in *Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl. 554, both relied on by respondent, are careful and elaborate expositions of the law.

They rest their conclusion, however, upon the proposition that the proceeding in ³¹⁷ question is not strictly in rem. For the reasons heretofore stated, we do not regard this ground, if it be well taken, as determinative of the question involved. In *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551, 38 L. R. A. 519, the court declared the Ohio "Torrens law" to be unconstitutional. While there is in the opinion some language which lends apparent support to the contentions of respondent, the fact is that the law there involved did not require personal service of summons or notice even upon resident claimants, whose existence, names and places of abode were all known to the plaintiff or petitioner. The same defect attached to the statutes which were declared null in *Brown v. Board of Levee Commrs.*, 50 Miss. 468, and *Webster v. Reid*, 11 How. (U. S.) 437, 13 L. ed. 761. That, as to such defendants, a service by publication is not sufficient to constitute due process of law in a proceeding not strictly in rem must be admitted. And in this connection it may be well to notice the contention of respondents, that by the terms of the act now under consideration the plaintiff in the proposed action may include among "unknown claimants" those who, with reasonable diligence on his part, might have become known to him. It is no doubt true that, so far as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in the cases which sustain the power to bind "unknown owners" by substituted service in actions of the character now under consideration: *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773. But we think that, on a proper construction, the act under examination does require the plaintiff to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants. It is not clear, as claimed by petitioner, that section 5 of the act requires in the affidavit a statement of the examination and inquiry made by plaintiff to enable him to aver that "he does not know and has never been informed of" any person claiming adversely. But apart from the affidavit the evident purpose of the act is to secure, so far as possible,

actual notice of the proceeding to all known ³¹⁸ claimants—by personal service if they reside and can be found within the state, by mailing if they cannot be so found or are non-residents. We have no doubt that where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. For the purposes of this statute the adverse claimants whom plaintiff “knows or of whom he has been informed” include all as to whom he would, by reasonable inquiry, have had knowledge or information. It is unnecessary to multiply authorities in support of the well-settled rule that “the means of knowledge is equivalent to knowledge”: Civ. Code, sec. 19; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807; *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51. The rule applies wherever the circumstances impose upon the party the duty of inquiry (*Bank of Mendocino v. Baker*, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833; *Prouty v. Devin*, 118 Cal. 258, 50 Pac. 380), and we are satisfied that the statute in question imposes upon the party seeking to proceed under it the duty of inquiry as to the names and residences of all persons who may claim an adverse interest in the property: *Leigh v. Green*, 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255; *Mulvey v. Gibbons*, 87 Ill. 367; citing, further, *Farnham v. Thomas*, 56 Vt. 33. So construed, the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law.

2. It is strongly urged for the respondent that the “action” contemplated by the statute is not a judicial but an administrative proceeding. The disposition of such proceeding being by the act conferred upon the superior court, it is claimed that there is a violation of the provision of the state constitution (art. 3, sec. 1), dividing the powers of government into three departments—the legislative, executive and judicial—and prohibiting the exercise by any one of these departments of functions appertaining to either of the others. It is also claimed as another result from the same premise that to divest property rights by a proceeding which is not judicial is not “due process of law.”

³¹⁹ To maintain the position that the proceeding is not judicial, the argument is advanced that the jurisdiction of the

court is (at least in cases where there is no "known" adverse claimant) invoked upon a mere allegation of the petitioner's right or title, without any assertion that such right is assailed or disputed by anyone, and that in such cases the decree rendered is a mere declaration of right, made substantially upon an *ex parte* application. It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties, and that the courts will not concern themselves with settling abstract questions of law which may never be involved in an actual dispute regarding property or other rights. Quotations to this effect may be found in a multitude of cases, many of which are cited in the briefs. But it is not to be understood that it is never the exercise of a judicial function for a court to act upon the application of a party who seeks some form of relief, even though at the outset of the proceeding no person is named or designated as opposing the granting of such relief. "It is certainly clear as a general rule," says Selden, J., in *Cooper's Case*, 22 N. Y. 67, "that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature." In the present case there is a provision for notice to all persons interested in opposing the plaintiff's application, and an opportunity to them to come in and oppose it. There are in our law many instances of proceedings which are analogous to the one under discussion, and they have uniformly been regarded as judicial. Thus, we do not question that the superior court exercises judicial functions in granting letters of administration, or admitting a will to probate, or ordering the sale of property of decedents, or distributing estates of decedents, or determining and declaring heirship, notwithstanding the suggestion made in one of the briefs that probate proceedings are "administrative." At any rate, it cannot be denied that such proceedings are judicial, where in response to the published or posted notice some person interested appears to contest the application, although at the outset the petition does not in any of the instances cited disclose a "controversy" or an "invasion of the petitioner's right" in any sense in which such elements³²⁰ are not present in the action brought under the statute now being considered. A petition for change of name (Code Civ. Proc., secs. 1275-1279) discloses neither controversy nor an actual or threatened denial by anyone of petitioner's

right, yet such proceeding is judicial: *In re Societe Francaise*, 123 Cal. 525, 56 Pac. 458.

Indeed, so far as this court is concerned, the question would seem to be foreclosed by the repeated decisions holding the proceeding for the confirmation of the organization of irrigation districts (Stats. 1889, p. 12) to be judicial, and properly committed to the superior court for determination: *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86; *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399, 773; *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. 381. In *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86, this court adhered to its earlier views regarding the construction and effect of the confirmatory statute of 1889, notwithstanding the suggestion of Brewer, J., in *Tregea v. Modesto Irr. Dist.*, 164 U. S. 179, 17 Sup. Ct. Rep. 52, 41 L. ed. 395, to the effect that the proceeding for confirmation presented a mere moot case, not calling for judicial consideration. But even the acceptance of the views of Justice Brewer would not require us to hold that the proceeding here involved is not judicial. The action or special proceeding now in question is devised, as has been stated, for the purpose of establishing a title which is in fact good, but which is not deducible of record. That a court of equity may remedy such defect by a decree, although there is no actual controversy as to the title, was held in *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. Rep. 720, 36 L. ed. 532, the court saying: "The title of the complainants is not controverted by the defendants, nor is it assailed by any action for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record, that is, by a judicial determination of its validity, and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim": See, also, *Blight's Heirs v. Bankes' Exrs.*, 6 T. B. Mon. 192, 17 Am. Dec. 136. ³²¹ And this court has held that in an action to quiet title under sections 738 and 739 of the Code of Civil Procedure the absence of a finding that the defendants asserted a claim adverse to the plaintiff is immaterial: *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 589, 23 Pac. 1102. "Even though the defendant makes no adverse

claim," says the court, "third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the court." The action here involved may well, as claimed by petitioner, be regarded as a suit to remove a cloud upon titles, the legislature having power to declare what shall form such cloud (*Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123), and having in effect declared by this statute that the destruction of public records constitutes a cloud upon title.

Again, it will be observed that in other states statutes providing for the determination of titles, under the Torrens system by administrative officers, have been assailed and declared void upon the ground that the power of determining such titles was essentially judicial and to be exercised only by the courts: *People v. Chase*, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105; *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551, 38 L. R. A. 519. The same view as to the nature of such functions was taken in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175, 57 L. R. A. 297.

The argument, advanced with much force and ability, that even a judicial proceeding cannot divest property rights, in the absence of an allegation of a controversy between parties to the record, may be viewed as a restatement, in another form, of the objections to statutes authorizing judgments against "unknown owners." This contention, if adopted, would require us to hold that, except in proceedings strictly in rem, no statute can constitutionally authorize valid judgments as against persons not ascertained or made parties defendant by name or other specific description. For the reasons before given we cannot accept this conclusion.

3. Finally, it is said that the statute violates the provision of the state constitution prohibiting the legislature from passing ³²² local or special laws in certain cases. Among the subjects included in the constitutional prohibition are laws "regulating the practice of courts of justice" (Const., art. 4, sec. 25, subd. 3), and "cases where a general law can be made applicable" (Const., art. 4, sec. 25, subd. 33), and these are the provisions principally relied on. The questions thus raised are sufficiently serious and important to merit a full

discussion, but by reason of the length which this opinion has already attained we are compelled to be brief in disposing of them.

Unquestionably this statute does make a number of provisions regarding the practice in the actions or proceedings here provided for which are not to be found in other judicial proceedings in this state. For example, the complaint does not name any defendants, even though there may be known adverse claimants. The names of known defendants do not appear in the caption of the complaint or the summons, nor in the body of the summons. In other respects, too, the summons is different in form from that used in ordinary civil actions. The proceedings for publication of summons differ in various particulars from the general statutory methods provided for publication of summons by sections 412 and 413 of the Code of Civil Procedure. Thus, no affidavit of diligence is required; the court is not authorized to designate a paper "as most likely to give notice" to the defendants; the order for publication is not required to direct the summons to be mailed forthwith to nonresident defendants; the period of publication is fixed by the statute at two months and is not in the discretion of the court. The foregoing enumeration, while not complete, represents in a general way the nature of the differences to be found between the procedure here authorized and that prescribed by the Code of Civil Procedure for ordinary civil actions. Do these differences render the act obnoxious to the constitutional provisions regarding special laws? This court has had occasion many times to consider what are special laws. "It is not necessary that a law shall affect all the people of a state in order that it may be general, or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things ³²³ of a class is special": *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71. The question of what is a special law as applied to the practice of courts of justice was carefully considered by this court in *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28, and it is sufficient here to restate what was said in that case. "But the mere fact that it (i. e., a statute) operates only on one class of cases does not make it repugnant to the constitutional provision. Our statutes contain many

provisions regulating the practice of courts of justice, applicable only to certain classes of actions or special proceedings, made necessary by the nature of the objects and purposes of the various cases. The legislature has the right to enact laws applicable only to one class of its citizens where the classification is authorized by the constitution, or is based upon intrinsic differences requiring different legislation. The law in this regard was well stated by this court, through Mr. Justice Harrison, in *People v. Central Pacific R. R. Co.*, 105 Cal. 576, 38 Pac. 905, 906, where it was said: 'A law which operates only upon a class of individuals is none the less a general law, if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law.' The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be 'founded on some natural or intrinsic or constitutional distinction' (*Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604), but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class": See, also, *Rode v. Siebe*, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342. The classification must not be arbitrary, for the mere purpose of classification, but must be founded upon some natural or intrinsic or constitutional distinction which will suggest a reason which might rationally be held to justify the diversity in the legislation: *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500.

"If the individuals to whom the legislation is applicable constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity³²⁴ or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation."

Under these rules we think the proceeding created by the act in question is sufficiently distinct and different from ordinary civil actions covered by the general rules of the code to justify the creation of a class which shall be characterized by the special rules of procedure here provided. As we have said, this act is intended to remedy an evil arising from an

unusual circumstance, to wit, the destruction of the public records and the consequent inability to deduce a safe or merchantable title to real estate. Such inability furnishes a good reason for the creation of a procedure which shall enable owners of real estate to establish their titles, not only as against known adverse claimants, but as against even unknown and undetermined persons who may claim adversely. Many of the differences above referred to are rendered necessary by the fact that this proceeding seeks to bind such unknown claimants. Thus, since claimants can be brought in only by publication of summons, it would be useless to require the plaintiff to furnish to the court an affidavit upon which the court may determine whether or not summons shall be published. If it is to be published in every case, why should there be proof of special facts authorizing a publication? Again, the fact that the court or judge cannot know who may be affected by the proceeding seems to furnish a reason for not requiring the designation of any particular newspaper as "most likely to give notice to the person to be served." The provision that the summons should be mailed to nonresident defendants within fifteen days, instead of forthwith, as required in ordinary actions, finds a reasonable justification in the fact that the summons so mailed must have attached to it a memorandum showing the date of the first publication. As the first publication may be some days after the order for publication, it might be impossible to attach this memorandum to the copy of the summons to be mailed, if such mailing were to take place forthwith.

The objections which are urged to the provisions of the statute authorizing a special form of complaint and summons may, we think, all be answered by saying that the proceeding ³²⁵ in question differs so materially from most actions as to justify such peculiarities in procedure. The primary purpose of the proceeding is to determine the status of the title to specific property. While the rights of individuals are necessarily involved and adjudicated, this primary purpose is sufficient to justify a form of pleading and process which shall direct attention to the land to be affected rather than to the persons who may be interested in it.

Our codes are full of provisions making special rules applicable to different classes of cases, and it has never been supposed that such provisions are invalid merely because the procedure in each case is not in every particular exactly the

same as for every other case. Thus, in actions for unlawful detainer the summons is returnable not less than three nor more than twelve days from its date (Code Civ. Proc., sec. 1166), thereby reducing the defendant's time to appear or answer below the ten days allowed in ordinary actions. The chapter providing for actions against steamers, vessels, and boats contains special provisions for the contents of the complaint (Code Civ. Proc., sec. 815), and for the service of summons (Code Civ. Proc., sec. 816). The summons in proceedings in eminent domain differs in various particulars from the form of summons in civil actions (Code Civ. Proc., sec. 1245). In proceedings relative to escheated estates the order requiring persons interested to appear and show cause why the estate should not vest in the state is published for one month, and parties interested have forty days from the date of the order to appear instead of having thirty days after a publication for at least two months, as in other cases of publication of summons. All of these differences may be upheld upon the ground that the proceeding in question is of such a peculiar nature as to justify its classification for purposes of procedure. Without considering in detail every point in which this act is said to differ from the code defining the general procedure in civil actions, we are satisfied that here, as in the Deyoe case, the nature of the proceeding is such as to justify the legislature in creating for it the special procedure prescribed by the statute. After all, the question of classification is primarily for the legislature. The court is not to set aside a statute merely because in its view it may have been unwise or unnecessary to apply certain rules to one ³²⁶ class of cases. Before the act can be declared invalid on this ground, it must appear to the court that there was no reasonable basis on which the peculiar legislative provision could have been made. We are not prepared to say that the needs which called this legislation into being, and the purposes sought to be accomplished, were not so peculiar in their character as to permit the legislature to devise this remedy and these methods of seeking it.

It is not necessary to decide at this time whether parties not personally served may come in and defend within one year after judgment, as provided in section 473 of the Code of Civil Procedure. Whether that section applies to proceedings under this act is a question of construction, which can best be

considered when it arises in a case directly involving the point. We doubt that the interpretation excluding the right to come in would invalidate the act. If it should be considered to have such effect, that would be sufficient ground for construing the act so as to allow the application of section 473 of the Code of Civil Procedure—a construction that is certainly possible under section 12 of the statute.

The objection is made that the act is special because it applies only where the records have been destroyed by earthquake, fire or flood. Possibly public records might be destroyed by other causes, but certainly the three agencies of destruction named are those which are most likely to occur in this state, and are the only ones which, so far as we know, have in our past history caused any considerable destruction of public records. These facts furnish ample ground for limiting the operation of the act to the cases to which it has been made applicable.

The title of the act is sufficient to comply with article 4, section 24, of the constitution: *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

A peremptory writ of mandate will issue as prayed.

Angellotti, J., Henshaw, J., Shaw, J., McFarland, J., Lorigan, J., and Beatty, C. J., concurred.

Rehearing denied.

The Constitutionality of Statutes providing for suits against unknown owners to quiet title to land is discussed in the note to *McClymond v. Noble*, 87 Am. St. Rep. 358. It has recently been affirmed that a statute which provides that if the owner of land shall fail to pay all arrearages of taxes thereon, the land shall be forfeited to the state without judicial proceedings, has been held unconstitutional as depriving the owner of his property without due process of law: *Parish v. East Coast Cedar Co.*, 133 N. C. 478, 98 Am. St. Rep. 718.

**DARBEE & IMMEL OYSTER AND LAND COMPANY v.
PACIFIC OYSTER COMPANY.**

[150 Cal. 392, 88 Pac. 1090.]

PARTITION, Estate Which is not Subject to.—Under a statute giving a right of partition to one or more cotenants who have an estate of inheritance or for life or for years, a cotenant of the right to lay down and plant oysters in any public waters of the state has no more than a mere personal license, and hence cannot maintain a suit for partition. (pp. 228, 229.)

F. J. Russell, for the appellant.

Campbell, Metson & Campbell, Charles Tupper King, J. R. Moulthrop and Reed, Nusbaumer & Black, for the respondents.

²⁹³ **McFARLAND, J.** Plaintiff, a corporation, brings this action for a partition of certain premises which it avers to be "real property," and avers that it has an "estate of inheritance" therein. A demurrer to the complaint was filed by some of the defendants. The demurrer was general and special, and was sustained in the court below, and judgment was rendered in favor of defendants. From this judgment plaintiff appeals.

The action is based on section 752 of the Code of Civil Procedure. That section is under the head of "Actions for the partition of real property," and it provides that an action for partition may be brought by one or more cotenants of real property, in which one or more of them "have an estate of inheritance, or for life or lives, or for years." The court below held that the complaint shows that neither plaintiff nor any of the defendants had an estate of inheritance, or for life, or for years, in any real property, and upon that ground sustained the demurrer; and as we think that this conclusion was right, we need not examine any other question raised in the case.

In the complaint the alleged real property in which plaintiff is averred to have an estate of inheritance is described as follows: "The right to the exclusive use and occupation thereof for the purposes of laying down and planting oysters and taking up and carrying off the same in and from said real property, in accordance with and as provided by the terms of an act of the legislature of the state of California, entitled ²⁹⁴ 'An act to encourage the planting and cultivation of

oysters,' approved March 30, 1874.'" Those parts of said act of March 30, 1874 (Stats. of 1873-74, p. 940), which are material here, are as follows: The title of the act is "An act to encourage the planting and cultivation of oysters," and the first section is as follows:

"Any citizen of the United States may lay down and plant oysters in any of the bays, rivers or public waters of this state; and the ownership of and the exclusive right to take up and carry off the same shall be continued and remain in such person or persons who shall have laid down and planted the same." The next sections, down to and including section 8, provide that the person desiring to use the right must define the limits of his claim by stakes, etc., must maintain thereon a sign on which must be painted the words "Oyster Beds," and must record a description of his bed or beds of oysters in the county recorder's office. (In the case at bar it does not appear that appellant complied with these provisions; but we will not consider that matter.) It is further provided that, after he has complied with these provisions, any person who enters thereon and carries off oysters or removes therefrom marks designating boundaries shall be guilty of a misdemeanor. Section 9 is as follows: "This act shall not apply to any tide lands which the state may have sold to private parties; provided, further, that nothing herein shall be so construed as to interfere with the right of the state to sell and dispose of any of the tide lands, nor to affect in any manner the rights of purchasers at any sale of tide lands by the state."

In the property described in the complaint there is no element of an estate of inheritance, or, as described in section 761 of the Civil Code, a "perpetual" estate. The privilege extended to all citizens by said act to temporarily use the unsold tide lands belonging to the state, if it can be considered as an estate at all in lands, is certainly of no higher dignity than an estate at will. But, in our opinion, it is really nothing more than a mere personal license. That was the view taken of similar statutes by the highest court of Maryland, where the oyster business is a very large one. In *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654, the court was dealing with statutes like ours, and it said: "It abundantly appears³⁰⁵ from the nature of the privilege in dispute, as well as from the terms in which it was conferred, that no transfer of

the state's title to lands covered by navigable water was contemplated. Permission to use given areas covered by navigable water for a particular purpose seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the state, but as a conditional license, revocable at the pleasure of the legislature." Again, in *Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673, Alvey, C. J., said: "These statutes, the better to promote the growth and to increase the supply of oysters in the waters of the state, provide that any of the citizens of the state may locate one lot, and only one, of five acres, in any unappropriated ground covered by the tide, and plant the same with oysters, and thereupon he is given exclusive control thereof. This, however, is not a grant of an indefeasible right or estate in the lot thus authorized to be located and planted with oysters. It is simply a conditional or qualified license or franchise, revocable at the will and pleasure of the state: *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654. It is neither inheritable nor transferable, but is purely a personal privilege in the party locating the lot."

The judgment appealed from is affirmed.

Angellotti, J., Sloss, J., Henshaw, J., and Lorigan, J., concurred.

Estates and Properties which are subject to partition are discussed in the note to *Nichols v. Nichols*, 67 Am. Dec. 703.

RIXFORD v. ZEIGLER.

[150 Cal. 435, 88 Pac. 1092.]

CONVEYANCE, Necessity for a Grantee.—A conveyance is void unless the grantee named is capable of taking and holding the property, and the grantee must be a person either natural or artificial. (pp. 230, 231.)

A CONVEYANCE Designating the Grantee as "the Community Styling Itself the German Roman Catholic St. Bonifazious Church Community," there being no corporation de facto or de jure, and the community being an unincorporated association of persons for religious worship, no member of which ever undertook to take possession of the property or to use it for any purpose specified in the conveyance, transfers no title and leaves the property subject to execution sale against the grantor. (p. 233.)

STREET ASSESSMENT, Judgment Foreclosing has No Effect Against Owners not Parties Thereto.—A judgment purporting to foreclose a street assessment has no effect against the owners of the property not parties thereto, and their title is not devested by a sale thereunder. (p. 233.)

D. H. Whittemore, for the appellant.

E. H. Rixford and J. A. Fairweather, for the respondent.

⁴³⁶ McFARLAND, J. This action was brought by the original plaintiff, F. G. Halsey, for the partition of a certain piece of land. It was averred in the complaint that Halsey and defendant Zeigler were the owners in fee of the land as tenants in common; and the other defendants were made parties, as claiming some interest in the property. Zeigler answered, admitting and averring that plaintiff and himself were owners of the land in contest as tenants in common, and united in plaintiff's prayer for partition. Defendant Perine answered, denying that plaintiff and Zeigler were the owners of the land, and averring that he, Perine, was the sole owner thereof. The other defendants made default. The court found that plaintiff and defendant Zeigler were the owners of the property, that Perine had no interest therein, and rendered an interlocutory judgment for a partition as prayed for in the complaint. From this judgment defendant Perine appeals.

The material facts are these: On July 8, 1864, one B. C. Vandall recovered judgment in the district court in and for the city and county of San Francisco against Harvey S. Brown for seventeen hundred and fifty-nine dollars and twenty-six cents, with interests and costs. On July 23, 1864, an execution was issued under said judgment, and was levied upon the land in contest in the case at bar as the property of said Brown; and by virtue of said execution the property was sold by the sheriff to said Vandall, and on June 7, 1865, the sheriff executed a deed to Vandall conveying to the latter all the title which Brown had in the land at the date of said judgment. Afterward, and before the commencement ⁴³⁷ of this suit, whatever title Brown had in the land at the time of the execution sale, etc., vested by mesne conveyances in the plaintiff Halsey and the defendant Zeigler.

Brown was admittedly the owner of the land at the time of the suit by Vandall, the execution sale, etc.; unless before that, on the 22d of December, 1862, he parted with the title by an

instrument in writing which he that day executed. This instrument purported to be a deed conveying the land in contest here to "the community styling itself the German Roman Catholic St. Bonifazieus Church Community." This instrument contains the following provision: "This conveyance is upon express condition that said property is to be used by said community for school and church purposes and for no other purpose whatever, nor shall said community sell or transfer the same or any part thereof, but the same shall be and remain the property of said community as long as they shall make use of said property for above purposes; but if they sell or transfer the same, or use it for any other purposes than those above mentioned, they shall forfeit all rights under this conveyance, and the said property shall revert to the first party and his heirs." It is found by the court upon sufficient evidence that at the time of the execution of said instrument the said church community was, and still is, an unincorporated association of persons associated together for the purpose of religious worship. It was not a corporation either de jure or de facto; it never pretended to act as a corporation. In the instrument no individual person was named as a grantee, nor was there any statement as to who constituted said church community. Neither the said community nor any of its members, nor any person claiming to act for it, ever took possession or used the said property for school or church purposes, or for any other purpose whatever, and never undertook to make any use whatever of the properties named in said instrument. In the case at bar all persons who are members of said community were made defendants, and they all made default.

Under these facts we are of opinion that no title ever passed out of Brown to any persons whatever by said instrument. The general rule is, beyond doubt, that a deed of conveyance is void unless the grantee named is capable of taking and holding the property named in the deed; and the general rule also is that to make a deed effective the grantee must be a person, ⁴³⁸ either natural or artificial, capable of taking and holding the property. In *Wiseman v. McNulty*, 25 Cal. 230, a deed had been made to the "Hibernia Company," and it was held void, the court saying: "The company does not appear to be a corporation nor even a partnership, holding the claims as partnership property, but simply a voluntary association not formed by articles in writing and without legal

existence—a body unknown to the law. As such, the company would be incapable of taking and holding mining claims, by grant, or by any other means, by which title to real estate would pass.” In *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57, the court approves a decision in the case of *Arthur v. Weston*, 22 Mo. 378. In that case it appeared that lands had been conveyed to “W. W. Phelps & Co.” At the trial Arthur offered to prove that when the conveyance was made to Phelps & Co. said firm was composed of Phelps, Cowdry, and Whitmore, but the court rejected the offered evidence, holding the law to be that “the deed to W. W. Phelps & Co. operated to vest the legal title in W. W. Phelps alone, and that the entire title passed by the sheriff’s deed under the execution sale, and gave judgment accordingly.” Upon writ of error the supreme court sustained the decision of the court below, holding that the deed to W. W. Phelps & Co. did not take effect as a legal conveyance of the premises to Phelps, Cowdry, and Whitmore jointly, but that it operated to convey the property to Phelps alone. The court observed that the question “is not merely whether the grantor intended to convey to the persons composing the firm, but whether the partnership style is, as a matter of law, a good name of purchase in a conveyance of real property sufficient to pass the legal title to all the individuals of the firm. . . . A conveyance of real property being required by the statute to be put in writing, the party who is to take as grantee must be sufficiently ascertained by the written instrument, or it is a nullity, so far as it purports to effect a transfer of the legal title”: See, also, *Sunol v. Hepburn*, 1 Cal. 254; *Phelan v. San Francisco*, 6 Cal. 531. In *Encyclopedia of Law and Procedure* (volume 13, page 624), it is said: “If the firm name is given and it consists of the surnames of the several parties, it will vest the legal title in them, and generally if members of a partnership are designated with sufficient certainty under a firm name they will take, but a general ⁴³⁹ or an abbreviated term such as ‘Company,’ ‘Co.’ or ‘Bro.’ is held to be insufficient.” The foregoing is undoubtedly the general rule; and there is nothing in the case at bar which brings it within any of the exceptions to that rule. The cases cited by appellant are where property had been granted for charitable purposes, and had been taken possession of and continuously used for those purposes by persons claiming to be intended

by a deed which merely uses the general name of the association; and in such cases courts of equity have devised plans for carrying out the intended charity; and they were cases where the persons claiming to be the beneficiaries under the deed were parties to the action asserting their rights. But nothing of the kind occurred in the case at bar. The persons who are members of the church community have never asserted any right under the deed, and from 1862, the date of the deed, to the present time, have never set up any claim under it. It is therefore our opinion that no title whatever passed from Brown to the said church community; that the title to the property was in Brown at the time of the sale under the Vandall judgment; and that such title was in the respondent at the time of the commencement of this action and when the judgment was rendered.

The appellant, Perine, claims title through a deed made by said Brown to one Spring, executed January 12, 1867. Whatever title Spring got from Brown went by mesne conveyances to one Gendotti, and afterward Perine brought suit to foreclose a street assessment on the land in question, in which Gendotti was made defendant, and after a judgment in that case in favor of Perine the sheriff made a deed under the decree to Perine. In that case Perine also made the "church community" by that general name a party, but did not make any one of the members of that community a party. Of course, if, as appellant contends, Brown's deed to the church community carried the title, he had nothing left to convey to Spring, and if Brown's deed did not convey the title to the church community, then his title passed under the Vandall judgment, which was prior to his deed to Spring. But it is sufficient to say that the judgment in the assessment case is of no value as against the respondents herein, who are the real owners of the property, and were not made parties to that suit.

⁴⁴⁰ The foregoing views make it unnecessary to notice other points made by respondents.

The interlocutory judgment appealed from is affirmed.

Sloss, J., Shaw, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

The Effect of a Conveyance to a grantee not in existence is the subject of a note to Davis v. Hollingsworth, 84 Am. St. Rep. 236.

MACKINTOSH v. AGRICULTURAL FIRE INSURANCE COMPANY.

[150 Cal. 440, 89 Pac. 102.]

INSURANCE, Change of Interest or Possession, What is not.—An agreement for the sale and purchase of real property amounting only to an option to purchase, and under which the insured remains entitled to free access to the property and its management in every respect as though all work done thereunder by the option-holder were being done by the assured, and that if the purchase money is not paid within a time specified, all payments made on the purchase price shall be forfeited, does not constitute a breach of condition against a change of interest or possession of the insured premises. (p. 238.)

INSURANCE, Waivers of Conditions by Agents.—Stipulations and conditions in a policy regarding the powers of agents and the manner of waiving conditions do not preclude a waiver by the conduct of authorized agents in regard to future operations on the premises, though the waiver is by parol or in other respects not made in the form provided for in the policy. (pp. 240, 241.)

INSURANCE—Power of General Agents to Waive Conditions. Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the insurers themselves. This rule includes all persons empowered to conclude contracts of insurance without first referring negotiations to their principals. (pp. 241, 242.)

INSURANCE AGENTS, Power of to Make New Contracts.—General agents of insurance companies have power to make new contracts. (p. 242.)

INSURANCE.—Subsequent Parol Waivers by a General Agent are valid though the policy requires them to be, and they are not, in writing. (p. 242.)

INSURANCE —Waivers, Failure to Indorse on Policies.—If an insured applies for leave to make a change in the condition of the property insured increasing the hazard, and is granted such leave by a general agent on paying an additional sum on account of the increase, a new contract is upon such payment created and precludes the insurer, though the waiver is not indorsed on the policy as stipulated for therein and it provides that waivers not so indorsed shall be void. (pp. 242, 243.)

INSURANCE—Estoppel.—Where an insurer acting by its agents authorized to make new contracts in its behalf receives an additional premium as consideration for assenting to an increase in the risk, but fails to indorse the new agreement or consent on the policy as required therein, the fault being that of the insurer, it is estopped from relying on such fault for the purpose of avoiding the policy and resisting a recovery thereon. (p. 243.)

INSURANCE—Watchman, When not Required to be Kept at Night.—If an insurance policy contains a permission for the works to remain idle, accompanied by a warranty by the assured "that at all times when the above works are idle and inoperative, one or more watchmen shall be kept constantly on duty at night," the assured is not required to keep a watchman at night when the works are operated during the day. (p. 243.)

INSURANCE—Property Insured, When not Deemed Idle or Inoperative.—If the insured property consisted of a smelter, and a furnace was subsequently placed therein by permission of the insurer and was in full operation, requiring the working of five or six men, and in connection with it one of the boilers and also the tools and water-pipes on the premises, and the buildings were occupied for the storage of ores and other materials, the premises were not idle and unoccupied within the meaning of a condition in the policy against them being idle, and unoccupied, though four boilers therein were not in use, nor were other parts of the buildings used except as above stated. (p. 244.)

INSURANCE—Forfeiture by Breach of Condition Against Premises Being Idle and Unoccupied.—Forfeitures are not favored. Hence it is not necessary to avoid a breach of a condition against the insured premises being idle and unoccupied that the works insured be kept in full operation, nor that all the furnaces in the insured smelter should be kept going every day. Nor is it material that the only furnace used was one constructed after the insurance was effected, if its construction was consented to by the insurer, who received compensation for the increased risk. (p. 244.)

Campbell, Metson & Campbell, G. W. Baker and Thomas H. Breeze, for the appellant.

Goodfellow & Eells, for the respondent.

442 **SHAW, J.** The action is upon a policy of insurance. The judgment was given for the defendant. The appeal was taken from the judgment within sixty days after its rendition, and the record is accompanied by a bill of exceptions.

The insurance company, in defense, alleged that there had been four several violations of the terms of the policy by the insured, without the consent of the company, and that the policy had been forfeited thereby, to wit: 1. That there had been a change of possession of the property; 2. That there had been a change of interest in the property insured; 3. That there had been an increase of hazard which was prohibited by the conditions of the policy; 4. That the property insured was idle and inoperative, and the insured had failed to keep a watchman constantly on duty, as the policy, in that event, required. The findings were in favor of the defendant on all these points. There was no substantial conflict in the evidence, and no serious dispute about the facts. The findings were manifestly based upon the court's conclusions as to the meaning and legal effect of the policy and the subsequent transactions of the parties. The decision of the case depends on the question whether or not the findings were justified by the evidence.

1. The first two defenses may be considered together. The change of interest and possession, if any, arose out of a proposed sale by the plaintiff to one G. W. Baker, after the issuance of the policy. A written agreement was executed between them, Mackintosh being the party of the first part and Baker being the party of the second part. It recited that the price of twenty-two thousand dollars for the property and certain slag and ore situated thereon had been agreed on, and that Baker was desirous of buying it at that price. It thereupon declared that he agreed that he would "purchase said premises and property" for said price, "in the following manner, that is to say:

"It is agreed between the parties hereto that the said party of the first part shall execute to the said party of the second ⁴⁴³ part a good and sufficient deed of the premises above mentioned and described, together with a bill of sale of the slag and ore situated thereon, and place the same in escrow with A. M. McDonald to be delivered to the party of the second part upon the payment of the said sum of \$22,000 on or before sixty days from the date hereof.

"In case the said \$22,000 is not fully paid within sixty days from the date hereof as aforesaid, said premises shall be vacated by the Vulcan Smelting and Refining Company *and surrendered by the party of the second part free and clear of all encumbrances* of whatsoever kind or nature made or suffered by the said Vulcan Smelting and Refining Company, and shall also surrender to the party of the first part the product of all ores smelted or reduced in its furnace from said slag-dumps while occupying the same.

"It is further agreed between the parties hereto that, *during the time the party of the second part is in possession of said property, the said party of the first part or his agent A. M. McDonald shall have free access to said property and its management in every respect, the same as though to all intents and purposes the work was being done by him, instead of by the party of the second part*, and during the time said work is carried forward the said party of the second part shall in every way protect said property and premises from any encroachments or depredations or damage of any kind, and not endanger the said premises by fire, or from any other cause.

"The sum of \$400 is hereby acknowledged to have been received upon this contract by the party of the first part and

the further sum of \$173 is to be paid to A. M. McDonald upon demand, which said sum, *in case of purchase*, is to be credited as part of the purchase price, and *in case of default is to be considered as rent of the premises during the occupation of the party of the second part*, as herein stated, and forfeited to the party of the first part.

“Time is of the essence of this contract.

“This contract shall not be assigned by the party of the second part until payment is made.” (The italics are ours.)

Baker was acting in the premises as agent of the Vulcan company. Prior to the execution of this agreement a previous agreement had been made between the same parties whereby Baker had obtained an option for sixty days for the purchase⁴⁴⁴ of said premises and property. That time had expired and this agreement was made for the purpose of renewing the option. Under the previous agreement Baker had taken possession of the premises and put up thereon a small six-ton smelting furnace, which he had been operating, for the purpose of testing the slag and ore upon the premises, in order to be the better able to determine whether or not he desired to purchase the same at the price fixed. In pursuance of the agreement quoted above it was understood that Baker should remain in possession of the premises for the purpose of making such further test of said slag and ore as he might deem necessary to enable him to determine what he desired to do in regard to the purchase of the property. When the time expired Baker surrendered the property and refused to purchase.

Taking the circumstances thus surrounding the parties and the language of the contract together, we are of the opinion that it was not an absolute agreement on the part of Baker to purchase the property, but was simply an option whereby he had the privilege of purchasing the same at any time within the sixty days mentioned, by payment of the price as therein provided. There was therefore no change of interest in the premises by virtue of the contract. The title, interest and estate in the property remained in Mackintosh, subject to be divested only by the payment of the money as provided in the contract. Upon failure to pay the money as provided therein, without any further act whatever on the part of Baker, the privilege to purchase, which he had obtained under the contract, ceased, and the property then remained free

from any right in him whatever. All that he possessed prior to the payment of such purchase money was a mere right at his option to purchase or not. This right did not create an interest in him within the meaning of that term as used in the policy of insurance. The change of interest referred to in the policy, in view of the well-known rule of construction applied to insurance policies requiring them to be construed most strongly against the insurer, refers to some change of interest which would make the loss, in case of destruction, fall upon the buyer, so that by such change the original policy-holder would lose his interest in maintaining the property and protecting it from fire. It does not refer to a mere right which another party may acquire which does not change the risk in ⁴⁴⁵ case of loss, nor give the third party more than a mere option to purchase the property. This rule regarding the change of risk might be different if it were not for the qualified character of the possession which was given to Baker under the arrangement between the parties. Baker was to have possession of the property merely for the purpose of operating the smelter in order to test the slag and ore, and the seller, notwithstanding such possession, was to have "free access to said property and its management in every respect the same as though to all intents and purposes the work was being done by him" instead of by Baker. Under these circumstances, a loss by fire occurring before the exercise by Baker of his option would fall upon Mackintosh. If it was caused by the negligence of Baker, Mackintosh could recover from him the damage, both by reason of the express covenant in the contract and by the general principles of law requiring him to exercise ordinary care in the use of another's property. This emphasizes and illustrates the proposition that the loss would be caused by the destruction of the property of Mackintosh. If it were the property of Baker, Mackintosh would suffer no damage. The contract could not have been enforced by Mackintosh as a contract of sale and purchase. The terms of the policy required a change of interest in order to work a forfeiture. This contract cannot be construed to have passed any interest whatever in the property to Baker, but merely a prospective right to obtain an interest. The interest would pass when he exercised the option and not before.

The same considerations apply to the contention that there was a change of possession of the premises when Baker was

holding under the owner, Mackintosh. He had no exclusive right to the property, and it further appeared that during the occupancy of Baker a watchman was kept on the property who was under the employment of and was holding for the seller, Mackintosh. Such common possession did not work the change of possession which would be required to avoid the policy. Furthermore, as will be hereafter seen, we think the conduct of the agents of the company was such as to waive any forfeiture on the ground of this particular change of possession.

2. The next defense is that there was an increase of hazard caused by the acts of the insured which, by the terms of the ⁴⁴⁶ policy, would cause its forfeiture. This increase of hazard arose from the erection upon the premises of a certain six-ton furnace by Mr. Baker, which was used by him for the purpose of testing the slag and ore upon the premises. This was erected some time in January, 1901, two months prior to the agreement above recited between Mackintosh and Baker. Before the erection of this smelting furnace, and before making the arrangement whereby Baker was to have possession of the works and operate the furnace for that purpose, the plaintiff's agent called upon the general agent of the defendant company and explained to him the circumstances and the proposed erection and operation of the furnace thereon for the purposes mentioned. The agent caused a rate to be fixed, and thereupon gave permission to erect said furnace and operate the same for sixty days, charging four dollars and twenty cents for the privilege. This permission expired upon the 16th of March following. The agreement above quoted was executed on that day, and thereupon the parties again called upon the general agent of the insurance company and explained their desire for a renewal of the permission and the purpose to continue the operation of this six-ton furnace for smelting the ore and slag on the premises. Thereupon the agent stated that it would be satisfactory to the company, and gave the desired permission, again charging the additional sum of four dollars and twenty cents for the privilege of so doing, which sum was paid, and the policy delivered to the agent for the proper indorsement. The policy provides that "unless otherwise provided by agreement indorsed hereon or added hereto," the policy should be void if the hazard be increased, or if any change, other than by the death of the insured, takes place

in the interest, title, or possession of the property. It further provides that "no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The indorsement made ⁴⁴⁷ upon the policy by the general agent of the company was as follows: "In consideration of \$4.20 additional permission is hereby granted to operate the within described smelter for a period of forty-five days from this date. (Signed) Edward Brown & Sons, General Agents." At the time this permission was given the six-ton smelter was on the premises, but it was not mentioned or described in the policy. The indorsement, therefore, did not, upon its face, give permission to operate the six-ton smelter, although doubtless it was so intended. We must consider the case upon the theory that no sufficient indorsement was made of the permission agreed upon and paid for. It is apparent from all the evidence that the parties all acted on the belief that the indorsement gave them permission to operate the six-ton smelter without invalidating the policy, and that the general agents of the company knew they so believed. It will be perceived that the general agent of the company was made fully acquainted with the increase of hazard and the change of occupation or possession contemplated by the parties, and that he agreed that the same might be done, and undertook to attach to the policy the required written permission for the contemplated changes. It further appears from the evidence that the parties, in reliance upon this arrangement, proceeded to operate the six-ton smelter and maintain the divided possession whereby Baker continued to operate the smelter and occupy the premises in conjunction with the watchman employed by the plaintiff.

The effect of such limitations upon the power of agents to waive the conditions in a policy has been a frequent subject of decision in the courts. The doctrine is well settled that such stipulations and limitations in a policy regarding the

powers of agents, and the manner of waiving its conditions, do not preclude a waiver by the conduct of authorized agents in regard to future operations upon the premises. In Cooley's Briefs on Insurance (volume 3, page 2607), with respect to limitations of this character, it is said: "Even this limitation will not prevent an insured from relying on a parol subsequent waiver by an authorized agent or officer, as 'there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing'": Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339; Hanover Fire etc. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772; Home Ins. ⁴⁴⁸ Co. v. Gibson, 72 Miss. 58, 17 South. 13; Wilson v. Commercial Ins. Co., 51 S. C. 540, 64 Am. St. Rep. 700, 29 S. E. 245; Lamberton v. Connecticut F. I. Co., 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; Renier v. Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208. And again, with respect to subsequent changes, it is said: "If an insurer, or authorized agent, consents to changes which are required to be indorsed on the policy, and promises to make the necessary indorsement, having access to the policy for this purpose, but fails to make the indorsement through mistake, oversight or neglect, the insurer will be bound, if not by a waiver, at least by an estoppel in pais": 3 Cooley's Briefs on Insurance, 2617. To this point very many cases are cited. And further on this subject in the same work (page 2658), it is said: "If an insurance company, with knowledge of facts vitiating a policy, by its acts, declarations or dealings leads the insured to regard himself as protected by the policy, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of forfeiture, and estop the company from relying thereon as a defense to an action on the policy." The permission to operate the six-ton smelter was made in consideration of the additional rate charged and paid. It was in effect a new contract executed between the parties, a contract which the law does not require to be in writing: Knarston v. Manhattan L. I. Co., 140 Cal. 57, 73 Pac. 740. The agent who made this new contract was a general agent of the company, and had authority to issue and deliver policies. "Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the companies themselves, and can therefore waive conditions and forfeitures": 3 Cooley's Briefs on Insurance,

pp. 2479, 2504, 2505. This rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those who have "full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements and cancel policies": 3 Cooley's Briefs on Insurance, p. 2480. Such limitations do not prevent the making of new contracts by the company or its authorized agents: *Home Ins. Co. v. Nichols* (Tex. Civ. App.), 72 S. W. 440; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 South. 13. And, as a general rule, a subsequent parol waiver by a general agent of conditions in a ⁴⁴⁹ policy are valid, although the policy requires them to be in writing: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; 3 Cooley's Briefs on Insurance, pp. 2601-2608. Waivers such as that here made, constituting, as they do, a new contract upon a sufficient consideration, need not be evidenced by a writing, and need not be indorsed on the policy, no matter what limitations or conditions are expressed in the policy, provided always they are made by an agent who would otherwise have authority to make the contract: 3 Cooley's Briefs on Insurance, p. 2695.

In *Gladding v. California etc. Ins. Co.*, 66 Cal. 6, 4 Pac. 764, the agent who attempted to waive the conditions was a local agent, and not, as here, a general agent, who, for contractual purposes, impersonated the company itself. The general remarks contained in the opinion in that case cannot be deemed authority, so far as they indicate a lack of power in the general agent to waive such conditions by acts amounting to a new contract or an estoppel, and without indorsement upon or attached to the policy. In *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, and *Enos v. Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 379, it was held that a mere local agent was without such authority unless specially empowered. This is the substance of the decision of the supreme court of the United States in *Northern Assur. Co. v. Grand View B. A.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213. In the present case it clearly appears that the agents who gave the permission and made the written indorsement were the general agents of the company, with full powers. This indeed is not controverted. The failure to accurately describe the six-ton smelter in the slip attached to the policy was the fault of the defendant, and any attempt on its part to avoid the policy because

of such failure would at once create an estoppel which would prevent the company from taking advantage of the misdescription. We are therefore of the opinion that the company waived the forfeiture which otherwise might have been caused by the increase of risk and partial change of possession in this case, and that it is now estopped from claiming such forfeiture after having knowingly allowed the parties to act in the belief that they had received the privilege which they were exercising and for which they had paid the additional premium.

3. The remaining defense is that the plaintiff has violated ⁴⁵⁰ the following clause in the policy: "Permission granted for the above-described works to remain idle, it being warranted by the assured that at all times when the above works are idle or inoperative, one or more watchmen shall be constantly on duty at night." At the time of the fire there was a watchman, in the employ of the plaintiff, on the premises, whose duty it was to keep guard and watch against danger from fire. The fire occurred on April 2, 1901, near midnight, and at that time, instead of being on watch, he had gone to bed and was asleep. We think under these circumstances it must be admitted that the plaintiff was guilty of a violation of this condition, if, as a fact, he was bound, under the other circumstances attending the case, to keep a watchman constantly on duty during the night-time. The obligation to keep a watchman on duty would not be observed by having a man asleep upon the premises. Because of this failure of the watchman to keep on duty the policy would be void, unless the works were neither idle nor inoperative at the time of the fire, within the meaning of the above clause. This clause did not require that the plaintiff should have been running the works day and night. What is contemplated by such a clause is the ordinary operation of the works during usual and customary hours: *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116; *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482; *Kansas etc. Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68. There was no evidence that it was usual or customary to operate such works at night, and the presumption is not that such is the case, but the contrary: Code Civ. Proc., sec. 1963, subds. 20, 28. The effect of such proof would be to establish a forfeiture, and consequently the burden was on the defendant to prove the usage or custom.

In the absence of such proof we must conclude that the policy did not require that there should be a watchman on duty at night during times when the works were in operation during the day.

From the 16th of March until the night of the fire the six-ton furnace erected by Baker under a shed on the premises thirty feet from the main building was in daily operation in the smelting of slag and ore. This operation required the work of five or six men on the premises. In connection with this work they were using one of the boilers belonging to the works and the water-pipes and tools of the plaintiff, and were ⁴⁵¹ occupying the buildings for the storage of ore and other materials. The six-ton furnace was a smelter, and was used to smelt the slag and ore in a manner substantially the same as that pursued in the use of the fifty-ton smelter covered by the policy. These four large smelters were not in use, nor was any other part of the buildings occupied in the work, except as above stated. Under these circumstances, we think the works were not idle or inoperative, within the meaning of the policy. Forfeitures are not favored in law. It was not necessary that the works should be kept in full operation or that all the furnaces should be kept going every day. A comparatively slight operation would suffice. The operation in good faith of one of the original furnaces would, so far as we can perceive, as effectually serve to prevent danger from fire at night, which was the object to be attained, as the full operation of all. Doubtless if Mackintosh himself had built an additional smelter on the grounds, and had operated the works with that alone, leaving the others idle, it would have been a sufficient performance of the obligation to run the works when there was no night watchman. The increase of the risk by the erection and operation of the six-ton furnace, as we have seen, was waived. That point being disposed of in that way, it is of no consequence, and does not change the legal rights of the parties, that the furnace in use was not one of the four which were insured, nor that it was not used by the plaintiff in person, but by Baker under the direction of the plaintiff or by his permission. There was a substantial operation of the works, which is all that was required: *Böle v. New Hampshire F. I. Co.*, 159 Pa. 53, 28 Atl. 205; *City etc. Mill Co. v. Merchants' etc. Ins. Co.*, 72 Mich. 654, 16 Am. St. Rep. 552, 40 N. W. 777; *Prieger v. Exchange M. I. Co.*, 6 Wis. 89.

In *McKenzie v. Scottish etc. Ins. Co.*, 112 Cal. 548, 44 Pac. 922, and *Brehm L. Co. v. Svea Ins. Co.*, 36 Wash. 520, 79 Pac. 34, 68 L. R. A. 109, there was no operation of the premises at all comparable to that here shown, and these cases are not in point. As the works were not idle or inoperative, the necessity for a night watchman did not exist, and the fact that one was employed, but failed to watch, did not affect the validity of the policy.

The findings are not sustained by the evidence, and the judgment is therefore erroneous.

⁴⁵² The judgment is reversed and the cause remanded for a new trial.

Angelotti, J., Sloss, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing, and filed the following opinion thereon on the 11th of March, 1907:

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. It is conceded that there was no watchman on duty, but it is held that the works were in operation. This conclusion, in my opinion, is opposed to any reasonable construction of the policy.

I dissent also from the doctrine that the parties to a written contract cannot bind themselves by a stipulation that it shall not be altered except by an agreement in writing. By such a stipulation they merely import into the particular contract the beneficent principle of the statute of frauds, thereby protecting themselves from the consequences of false claims of alterations.

I deprecate especially the disposition of courts to deprive insurers on slight and insufficient grounds of the benefit of proper stipulations and conditions inserted in their policies for the legitimate and laudable purpose of compelling the insured to protect the insured property from unnecessary and easily prevented hazards. The necessary effect of such a course of decision is to increase premium rates, and the final result in the long run is that careful and honest policy-holders pay for the losses of the reckless and dishonest.

A Policy of Fire Insurance is not Forfeited by the insured entering into an executory contract for the sale of the premises: *Garner v. Milwaukee Mechanics' Ins. Co.*, 73 Kan. 127, 117 Am. St. Rep. 460, and cases cited in the cross-reference note thereto.

The Waiver of Conditions in Insurance Policies is the subject of an extended note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 99.

GOORBERG v. WESTERN ASSURANCE COMPANY.

[150 Cal. 510, 89 Pac. 130.]

INSURANCE, Severability of.—Whether a Contract is Entire or Severable is a Question of Intention to be determined from the language employed by the parties in the light of all the circumstances surrounding them at the time they contracted. (p. 250.)

INSURANCE—Breach of Condition, When does not Avoid Policy as to All the Subjects Insured.—Where the property insured is so placed that the risk on each item is separate and distinct, so that what affects the risk on one does not affect the risk on the others, the policy is divisible. (pp. 250, 251.)

INSURANCE, Severability of not Controlled by the Entirety of the Premium.—The mere fact that the premium paid for insuring distinct articles of property is entire does not conclusively establish that the contract of insurance is not severable. (p. 251.)

INSURANCE of Building and Furniture Therein, Entirety of.—If a Building and the Furniture Therein are Insured, and there is a breach of condition respecting the title to the building, this relieves the insurer from liability for the furniture, for, as the breach of the condition increases the hazard as to the building, it must also be presumed to have increased the hazard as to the furniture therein. (pp. 251, 252.)

INSURANCE—Breach of Condition, When not Waived by Failure to Return Premium After Loss.—If an insurer after a loss, having knowledge of the breach of a condition, denies liability, but does not offer to return the premium received, it does not thereby waive its right to defend on account of such breach. (p. 253.)

INSURANCE—Waiver of Breach of Condition, Failure to Plead.—If a complaint to recover insurance shows the breach of a condition, but avers the issuing of a policy with knowledge of the facts constituting such breach, and does not allege a waiver resulting from the retention of the premium after the loss occurred, this latter waiver is not admissible under this pleading. (p. 254.)

Sylvester G. Williams and Edwin A. Meserve, for the appellant.

George L. Keefer, for the respondent.

511 SLOSS, J. This is an action upon a policy of fire insurance, by which, in consideration of a premium of \$21.75, the defendant insured the plaintiff in the sum of \$1,700

against ⁵¹² loss or damage by fire to five different items of property, a specific amount of insurance being apportioned to each item; that is to say, \$550 on a frame dwelling, situate upon certain land described in the policy; \$725 on household furniture contained in said dwelling; \$150 on a smaller dwelling, situate upon the same land; \$75 on household furniture situate in the smaller dwellings; and \$200 on tools, farming implements, etc., contained in the building first described. A fire occurred, causing damage to each of the five items. The amount of such damage is not here in dispute.

The principal defense, and the only one which need be considered on this appeal, is based upon the following provisions of the policy: "This entire policy shall be void if the insured has concealed, or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

It appears that the buildings were located upon unsurveyed government land, to which plaintiff had no title. He was merely in possession as a "squatter."

The plaintiff claimed, and so alleged, that any warranty as to title had been waived by defendant's agents, in that they had caused the policy to be issued after having received from plaintiff full notice of the fact that he was holding as a "squatter" on unsurveyed government land. This alleged notice and waiver were denied by the insurer, which alleged that plaintiff, at the time of applying for the insurance, stated to defendant that he was the owner in fee simple of the land, and on these issues the case went to trial before a jury.

The court charged the jury as follows:

"I instruct you that on the evidence before you, without any conflict, the plaintiff is entitled to a verdict for \$748.95 for loss on the personal property described in the policy of insurance.

"As to the loss claimed on the buildings, I instruct you that if you find that the defendant or its agents did not know, or had not been informed at the time of the issuance of the policy, that the plaintiff did not own the land on which the ⁵¹³ buildings were located, and did not learn that plaintiff did not own the land until after the commencement of this action,

then plaintiff is not entitled to recover anything for the loss of the buildings. But if defendant or its agents did have knowledge of the plaintiff's title or learned of it before the fire, then there was a waiver of the fact that plaintiff did not own the land and plaintiff is entitled to recover the loss of said building, viz.: \$575.30. If you find on this issue in favor of the plaintiff, your verdict will be for the plaintiff for \$1,324.25. If you find on this issue in favor of the defendant, then your verdict will be for the plaintiff in the sum of \$748.95."

The verdict was for \$748.95 (the amount of loss claimed on the second, fourth, and fifth items of the policy), and defendant appeals from the resulting judgment and an order denying a new trial.

It is evident that the trial court regarded the conditions and warranties which we have quoted as applying solely to the buildings insured, and not to the contents of those buildings. In other words, the policy was treated as severable into as many contracts as there were items insured. Whether such policies, insuring distinct items for different amounts, in consideration of a gross premium, are to be regarded as entire or severable, is a question that has not heretofore come before this court, although it has been passed on by the courts of many other states. The authorities on the point are so numerous that it would be impracticable to attempt to review, or even to cite, all of them. There is conflict between the adjudications of different courts, and even, in some instances, between those of the same court. In a general way, the effect of the cases may be summarized and illustrated by saying that the courts of a number of states have laid down the rule accepted by the trial court in the case at bar—namely, that where the property insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property, even though the premium be entire: *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184; *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 514 9, 81 Am. Dec. 521; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696, 43 N. W. 340, 6 L. R. A. 524; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Loehner v.*

Home Mut. Ins. Co., 17 Mo. 247; Sullivan v. Hartford Fire Ins. Co., 89 Tex. 665, 36 S. W. 73; Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Clark v. New England Mut. Fire Ins. Co., 6 Cush. 342, 53 Am. Dec. 44; Bullman v. North British etc. Ins. Co., 159 Mass. 118, 34 N. E. 169; Wright v. Fire Ins. Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; Coleman v. New Orleans Ins. Co., 49 Ohio St. 310, 34 Am. St. Rep. 565, 31 N. E. 279, 16 L. R. A. 174; Light v. Greenwich Ins. Co., 105 Tenn. 480, 58 S. W. 851; Connecticut Fire Ins. Co. v. Tilley, 88 Va. 1024, 29 Am. St. Rep. 770, 14 S. E. 851; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

On the other hand, there are many cases holding that such contracts are entire, and that a breach of any condition or warranty vitiates the whole insurance, most of these decisions basing their conclusion on the ground that the premium was a single or gross sum: Gottsman v. Pennsylvania Ins. Co., 56 Pa. 210, 94 Am. Dec. 55; Day v. Charter Oak etc. Ins. Co., 51 Me. 91; Plath v. Minnesota Farmers' Mut. Fire Ins. Assn., 23 Minn. 479, 23 Am. Rep. 697; Garver v. Hawk-eye Ins. Co., 69 Iowa, 202, 28 N. W. 555; Cuthbertson v. North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 258; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821, 52 L. R. A. 70; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 51 Am. St. Rep. 457, 33 Atl. 429, 30 L. R. A. 633; McGowan v. People's Mut. Fire Ins. Co., 54 Vt. 211, 41 Am. Rep. 843.

There is still another line of cases which take a middle ground between the extreme doctrines above stated, and hold that the question of the severability of the contract in such cases depends upon the nature of the risk—i. e., that where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk⁵¹⁵ on one item does not affect the risk on the others, the policy must be regarded as severable: Havens v. Home Ins. Co., 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137; Phoenix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 546; Pickel v. Phoenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Worahek v. New Denmark etc. Fire Ins. Co., 102 Wis. 88, 78

N. W. 411; *Taylor v. Anchor Mut. Fire Ins. Co.*, 116 Iowa, 625, 93 Am. St. Rep. 261, 88 N. W. 807, 57 L. R. A. 328; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379; *Republic Co. etc. Ins. Co. v. Johnson*, 69 Kan. 146, 105 Am. St. Rep. 157, 76 Pac. 419; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. L. 427, 14 Atl. 615; *Brehm Lumber Co. v. Svea Ins. Co.*, 36 Wash. 520, 79 Pac. 34, 68 L. R. A. 109; *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, 79 Pac. 287; *Aetna Ins. Co. v. Resh*, 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422, 49 Am. Rep. 324.

In our opinion, the rule declared in the cases last cited is supported by reason and tends to produce a just result. Whether a contract is entire or severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted: *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305. In these cases the policy, insuring several classes of property, provides that it shall be void in certain events. In view of the settled rule that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer, it is proper to say that this language should not be given the effect of avoiding the policy as to every item insured in all cases. Where the warranty or condition which is broken does not affect the risk on certain items, the insurance should not be held to be ineffective as to those items. Such construction would subject the insured to a forfeiture for a cause which had no substantial relation to the interest of the insurer. The purpose of the warranties and conditions is to protect the insurer from liability on risks which he would have been unwilling to take for the stipulated premium, or perhaps for any premium. And if, as to any item, the breach of condition or warranty does not at all affect the risk, the release of the insurer from liability for that item may fairly be said not to have been⁵¹⁶ within the reason of the condition or warranty, and hence not within the contemplation of the parties. For example, where a single policy insured, in separate amounts, two buildings situated upon farms several miles apart, the breach of a warranty of title as to one would not in the slightest degree increase the risk on the other, and the policy should be held severable: *Loomis v. Rockford Ins. Co.*, 77 Wis. 87, 20 Am.

St. Rep. 96, 45 N. W. 813, 8 L. R. A. 834. We do not think the mere fact that the premium is entire should affect this conclusion. On the other hand, where the breach of condition, although in terms affecting only one item, is such as to increase the hazard to which other items are subjected, the avoiding of the policy as to all such items is the very thing which is requisite in order to protect the insurer from having to assume a greater risk than the one he had contracted for. Take the case here presented, of a building, and furniture in the same, both covered by the same policy. There is a breach of a warranty or a misrepresentation relating to the title to the land on which the building was situated. That any misrepresentation as to title is material, and has the effect of avoiding the policy, at least as to the building, is undisputed. And one ground upon which the materiality of statements as to title has been put is that they "might, and probably would, influence the mind of the underwriter in forming or declining the contract. Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk or in estimating the premium": *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. ed. 335; 10 Pet. 507, 9 L. ed. 512. "In other words, it is in their relation to the moral hazard that the materiality of statements as to title or interests rests": 2 Cooley's Briefs on Insurance, 1340. The risk is greater, then, where a man insures a house which is on land not belonging to him than it would be if he owned the land. But if the risk on the house is greater by reason of the want of ownership, it is clearly greater as to the contents of the house. It is of course possible that a house may burn, and a part or all of its contents be saved, but surely the contents of a house are in great danger of burning if the house takes fire, and any circumstance which⁵¹⁷ increases the risk of fire to the house necessarily increases the risk to the contents. If the insuring company would have been unwilling to insure a house on land not belonging to the insured, because it might be more advantageous to the insured to have the house burn than to have it saved, it can hardly be supposed that it would have consented to take the risk on furniture contained in a house exposed to such hazard. It is, we think, no answer to this position to say, as was said

in *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184, a case frequently cited, that insurance companies habitually insure the contents of buildings without insuring the building or inquiring about its ownership. Such insurance on the contents alone would involve no unusual hazard. It would not tempt the insured to permit his furniture or other movables to burn. But if it be coupled with insurance on a building which he does not own, and by the destruction of which he would profit, both the house and its contents are subjected to a risk which the insurer was not willing to assume, and one against the assumption of which he expressly contracted. In the case at bar, the court directed the jury to find a verdict for the plaintiff for the loss on the contents of the buildings notwithstanding the defense, and the evidence in support of it, that there had been a misrepresentation, which, as the defendant claimed, had not been waived. Under the views above set forth, this was error. The risk to the contents of the building was directly affected by any circumstance which affected the risk to the buildings themselves, and the contract should, so far as concerns the representation as to title, have been treated as entire.

In the foregoing discussion we have laid no stress on the fact that the language of the policy is that "this entire policy shall be void, if," etc. In most of the cases cited above the word "entire" did not appear in the policy in this connection. It has been held (sometimes even in jurisdictions where separate valuations are ordinarily regarded as rendering the contracts divisible) that the inclusion of this word makes the contract entire and indivisible: *Germania Fire Ins. Co. v. Schild*, 69 Ohio St. 136, 100 Am. St. Rep. 663, 68 N. E. 706; *Germier v. Springfield etc. I. Co.*, 109 La. 341, 33 South. 361; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 51 Am. St. Rep. 457, 33 Atl. 429, 30 L. R. A. 633; *Martin v. Insurance Co.* 518 of N. A., 57 N. J. L. 623, 31 Atl. 213; *McWilliams v. Cascade etc. I. Co.*, 7 Wash. 48, 34 Pac. 140. But there are also cases holding, in effect, that no valid distinction can be drawn between the words "this policy shall be void" and "this entire policy shall be void": *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983; *Trabue v. Dwelling-House Ins. Co.*, 121 Mo. 75, 42 Am. St. Rep. 523, 25 S. W. 848, 23 L. R. A. 719. In

view of our conclusion that the policy in question is for other reasons an entire contract, it is not necessary in this case to express any opinion as to the effect of the use of the word "entire" in a policy which in the absence of such word would be treated as divisible.

The respondent contends that whatever construction be put upon the policy, the judgment must be affirmed, because there was uncontradicted testimony to the effect that shortly after the fire the company ascertained the true state of the title, and for a period of several months thereafter, and up to the time of trial, made no offer to return the premium. During all this time, however, it denied liability. It may be conceded that if, by reason of a breach of warranty as to title, no risk ever attached, the insured was entitled to a return of his premium: Civ. Code, sec. 2617. But the insurer's delay in offering to repay it (assuming the delay to have been unreasonable) did not forfeit the right to defend for such breach. The cases cited to the proposition that a party cannot rescind a contract without restoring what he has received under it are not in point. The defendant is not in this action seeking to rescind the contract sued upon; it is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or nonaction of the insurer after the loss, it is essential "that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action": *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1003; *McCormick v. Springfield etc. I. Co.*, 66 Cal. 361, 5 Pac. 617. Here nothing was done which could have led the insured to believe that the defendant would not take advantage of the breach of warranty. On the contrary, it persistently asserted its reliance upon such breach. If the case of *Fishbeck v. Union Ins. Co.*, 54 Cal. 422, is in conflict with these views, it must be regarded as overruled by the *McCormick* cases just cited: See, also, *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Austin v. Mutual R. F. L. Assn.*, 132 Fed. 555; *Thompson v. Travelers' Ins. Co.*, 11 N. Dak. 274, 91 N. W. 75; *Blaeser v. Insurance Co.*, 37 Wis. 39, 19 Am. Rep. 747.

Furthermore, the retention of the premium was not pleaded by the plaintiff. His complaint showed affirmatively that there had been a breach of warranty as to title, and to overcome this he was obliged to allege facts showing a waiver or estoppel. He met this requirement by alleging the issuance of the policy by the defendant after notice of the defect of title, but this did not put in issue any waiver or estoppel that might have been created by other facts. If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance: 19 Cyc. 923; Gillon v. Northern Assur. Co., 127 Cal. 480, 59 Pac. 901; Vernon Ins. etc. Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755; Bruce v. German Sav. etc. Soc., 24 Or. 486, 34 Pac. 16; McCoy v. Iowa State Ins. Co., 107 Iowa, 80, 77 N. W. 529.

The judgment and order appealed from are reversed.

Henshaw, J., McFarland, J., and Lorigan, J., concurred.

Where Property Insured is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy is usually regarded as entire and indivisible; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy is usually regarded as severable and divisible: Phenix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393; Louis v. Rockford Ins. Co., 77 Wis. 87, 20 Am. St. Rep. 96; Manchester etc. Assur. Co. v. Glenn, 13 Ind. App. 365, 55 Am. St. Rep. 225. As to whether the fact that the premium is entire is conclusive of the indivisibility of a policy, see Taylor v. Anchor Mut. Fire Ins. Co., 116 Iowa, 625, 93 Am. St. Rep. 261; Republic County Mut. Fire Ins. Co. v. Johnson, 69 Kan. 146, 105 Am. St. Rep. 157.

MARTINOVICH v. MARSICANO.

[150 Cal. 597, 89 Pac. 333.]

ESTATES OF DECEDENTS—Decree of Distribution, Effect of on Attachments.—If an attachment is levied on the interest of an heir in real property, who subsequently conveys to a third person, to whom the property is distributed by the final decree of distribution, this does not affect the rights acquired by the levy of the writ nor constitute any defense to an action to recover the property, bought by the purchaser at an execution sale whose title relates back to and takes effect from the levy of the attachment. (p. 256.)

ATTACHMENT—Several Writs of Attachment may Issue Upon a Single Affidavit or Undertaking.—Hence a writ is not invalid because the affidavit showing proper cause for an attachment had been filed two days before the writ issued. (p. 257.)

ATTACHMENT, Issuing Writs of at Different Times.—The several writs of attachment to which the plaintiff is entitled on the filing of his affidavit and undertaking need not all issue at the same time. Therefore, though a writ is issued on a proper affidavit and undertaking, other writs may subsequently issue based thereon. (p. 257.)

ATTACHMENT, Collateral Attack Upon Because Issued Too Long After the Filing of an Affidavit and Undertaking.—If an attachment is issued some days after the filing of an affidavit therefor, the only remedy of the defendant is by motion to set the writ aside. He cannot on account of such intermission avoid the effect of a judgment subsequently entered in the attachment, nor prevent the sale thereunder from relating back to the levy of that writ. (p. 259.)

James H. Boyer, for the appellant.

Naphtaly, Freidenrich & Ackerman and Waters & Wylie, for the respondent.

⁵⁰⁸ **ANGELLOTTI, J.** This is an action to quiet title, involving an undivided half of the northeast quarter of the northeast ⁵⁰⁹ quarter of section 10, township 1 south, range 7 west, San Bernardino base and meridian, in San Bernardino county. From a judgment therein in favor of defendant the plaintiff appeals.

Cerverio Martinovich died testate on February 6, 1889, the owner of the property above described. By the terms of his will, the undivided one-half thereof in controversy was devised to his widow, Sophia Martinovich. On December 1, 1897, defendant commenced an action in the superior court of the city and county of San Francisco against said Sophia Martinovich. On December 16, 1897, he filed in said action an affidavit and an undertaking for attachment in regular form, and on that day a writ of attachment was regularly issued from said court, directed to the sheriff of the city and county of San Francisco. On December 18, 1897, without filing any new affidavit or undertaking, he procured to be issued by said clerk another writ of attachment in said action, directed to the sheriff of San Bernardino county. Under this writ, the property involved was attached on December 20, 1897, by the sheriff of San Bernardino county, in the manner provided by law. On February 14, 1898, no motion to dissolve said attachment ever having been made, judgment was given in said action in favor of this defendant and against Sophia Martino-

vich for three thousand and eighty-three dollars and nineteen cents, and a transcript of the original docket of this judgment, duly certified, was filed and recorded in the office of the county recorder of San Bernardino county on April 8, 1898. On June 30, 1898, execution was duly issued out of the superior court of the city and county of San Francisco, and levied by the sheriff of San Bernardino county on this property, and he, after due notice, on July 25, 1898, sold the property at public sale to defendant. No redemption having been made, said sheriff, on December 16, 1899, executed a deed for the property to defendant.

In the meantime, on March 29, 1898, which was after the attempted levy and the judgment, but prior to the filing of the transcript of the docket in San Bernardino county, Sophia Martinovich executed and delivered a conveyance of the property to plaintiff. This deed was not recorded until February 20, 1903. On March 30, 1898, a decree of final distribution in the matter of the estate of Cerverio Martinovich was made by the superior court of the city and county of San Francisco, ⁶⁰⁰ and by this the property here involved was distributed to plaintiff, it being recited in the decree that it had been made to appear to the court that said Sophia had transferred the same to plaintiff. This decree was entered in the minutes of the court April 21, 1898, and a certified copy thereof was recorded in the office of the county recorder of San Bernardino county on June 25, 1898, which was before the sheriff's sale.

Upon these facts judgment was properly given for defendant.

Such rights as defendant may have had under the attachment levy were in no way affected by the decree of distribution. He was not required to present his claim in this behalf to the probate court and was not entitled to participate in the distribution of the estate, and the property distributed continued to be subject to the lien of his attachment, if the property had been legally attached, which for the present we assume to have been the case: See *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459.

Concededly, a sheriff's deed executed in pursuance of an execution sale under a judgment rendered in an attachment suit relates back to and takes effect from the levy of the attachment, if the levy was such as to create a lien: *Porter v. Pico*, 55 Cal. 165; *Godfrey v. Monroe*, 101 Cal. 224, 35

Pac. 761; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542. If the attachment was valid, plaintiff therefore acquired the property from Sophia Martinovich subject thereto, and subject to the subsequent proceedings to enforce the judgment recovered against her.

Plaintiff claims that there was no valid attachment as to this property, for the single reason that the San Bernardino writ was issued by the clerk without the giving by plaintiff of any additional affidavit or undertaking. Manifestly, it was considered sufficient that an affidavit showing a proper case for an attachment and an undertaking in due form had been filed two days before. We have no doubt that such affidavit and undertaking constituted a sufficient legal basis for the writ. It is not claimed that several writs may not be issued upon a single affidavit and undertaking to the sheriffs of different counties. That this may be done is clearly shown by the statute: Code Civ. Proc., secs. 537-540. But it is ~~601~~ contended that all writs so issued must be issued at the same time. This contention is based upon the fact that sections 538 and 539 of the Code of Civil Procedure require the clerk to issue the writ upon receiving the affidavit and undertaking, and that section 540 of the Code of Civil Procedure, after declaring that the writ must be directed to the sheriff of any county in which property of the defendant may be, and in terms require him to attach and safely keep all property of the defendant within his county not exempt from execution, provides: "Several writs may be issued at the same time to the sheriffs of different counties." This provision of section 540, as we read it, was intended solely in aid of the plaintiff in attachment, and the whole purpose was to authorize such a plaintiff to have at one time two or more writs addressed to sheriffs of different counties, so that property of the defendant in various counties necessary to secure the plaintiff's claim may be levied on under the one proceeding for attachment instituted by him. The plaintiff in attachment is, by virtue of the showing made and security given, entitled to have as many writs issued to different sheriffs as he may see fit to demand. All writs so demanded and issued constitute parts of the one proceeding to have the property of the defendant in the state levied on as security for any judgment that may be obtained, and have for their basis the affidavit and undertaking given to secure the remedy of attachment.

If by his first demand he has failed to ask for and secure a writ for a county in which he almost immediately thereafter discovers attachable property necessary to his security, no good reason is apparent why he may not reach such property by procuring what he would have been entitled to as a matter of right in the first instance by including it in his demand to the clerk, thus accomplishing the same result that he would be enabled to obtain as to property subsequently discovered in a county for which a writ had issued, before the return of the attachment, by a simple direction to the sheriff. The mere fact that a writ has been issued as to one county of the state should not deprive the plaintiff of his right to a writ for any other county, and the statute does not, in our opinion, have any such effect. Such fact does not detract from the power and duty of the clerk to issue, upon the affidavit and undertaking already filed, writs to other counties as demanded.

⁶⁰² It is urged that if the statute be so construed as to authorize a second writ subsequent to the issuance of the first, conditions may have so changed in the meantime that the affidavit no longer speaks the truth as to the matters essential to the right of attachment. This, however, would be true as to any writ of attachment issued. It has not been attempted to prescribe by our statute the time within which, after the making or filing of the affidavit, a writ may legally issue, nor to limit the force and effect of the affidavit to any specified time after its execution. Some time must, from the nature of things, elapse between the making of the affidavit or its filing, and the issuance of any writ, during which time, however short, a change may occur as to some fact required to be alleged in such affidavit. It is impossible to absolutely prevent this, as successive steps in a proceeding cannot be contemporaneously taken. The mere requirement that all writs issued should be concurrently issued would not absolutely prevent it. It was said in *Wheeler v. Farmer*, 38 Cal. 203, that an objection that an affidavit for attachment was made before the commencement of the suit was manifestly untenable, and that there was no valid objection to a complete preparation of all the papers requisite to the writ before the complaint was prepared. It has been said elsewhere that, as the ground of attachment must exist at the time the warrant of attachment was issued, an unreasonable time should not be allowed to elapse between the making

of the affidavit and the issuance of a writ. By the term "unreasonable time," as herein used, is meant such delay as would under the circumstances cast suspicion on the verity of the affidavit, or lead to the supposition that the ground stated for the attachment had ceased to exist: See *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289, and cases there cited. We think that as to this particular matter the true rule, in the absence of statute to the contrary, is as stated in *Hadden v. Linville*, 86 Md. 210, 38 Atl. 900, where the objection was to the jurisdiction for the reason that the affidavit was made several months before the issuance of the attachment, the appellant insisting that the affidavit must be made either at the time of the institution of the suit or as shortly before as conveniently might be. The court said: "But while we are of opinion that there may be such delay between the making of the affidavit and the suing out of the writ as may reasonably induce a presumption, when taken in connection with other facts properly proven, that the process of the court is being abused, or that the facts set forth in the affidavit may not be true when the suit is instituted, yet we do not think such divergence of dates is a jurisdiction matter, that will enable this court, on appeal, to consider the question in a case like the one at bar, where the point was not raised and considered below on appropriate motion or plea." This is as applicable to a second writ issued to another county after the issuance of the first writ, as it is to a case of delay between the making of the affidavit and the procuring of the first writ. The protection afforded by the law to the defendant against an improper attachment is as broad in the one case as in the other. In each, no jurisdictional defect being apparent on the face of the proceeding, his only remedy, under our system, is a motion to set aside the attachment, and on this motion the showing made by the affidavit in support of the judgment can be assailed, and the attachment which has been improperly issued discharged: Code Civ. Proc., secs. 556-558. The reason advanced by plaintiff in support of the construction of section 540 contended for by him appears to us to be without force.

The San Bernardino writ of attachment must here be held to have been legally issued. Admittedly, the levy thereunder was in full compliance with the statute. The attachment

proceedings operated, therefore, to render the subsequent sheriff's deed effectual from the date of the levy, and paramount to plaintiff's deed from Sophia Martinovich, executed subsequent to such levy.

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

The Sheriff's Deed to a Purchaser at an execution sale transfers all the title which the defendant held when the execution lien attached, and takes precedence over subsequent liens and transfers. To this extent the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created: Greer v. Wintersmith, 85 Ky. 516, 7 Am. St. Rep. 613; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 188; Edwards v. Thompson, 85 Tenn. 720, 4 Am. St. Rep. 807.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

KINLEY v. KINLEY.

[37 Colo. 35, 86 Pac. 105.]

TRUSTS—Parol Evidence to Establish.—An express or direct trust cannot be established by parol evidence. (p. 262.)

D. C. Webber and H. C. Benson, for the appellant.

Talbot, Denison & Wadley and W. H. Hunt, for the appellee.

³⁶ GUNTER, J. In 1881 plaintiff (appellee) and defendant (appellant) were married. Defendant at the time was a widow with two children. A child was born of the marriage. Defendant after marriage, and between 1881 and 1893, purchased certain lots in an addition to Denver, with funds provided by plaintiff, the deed therefor being taken in her name, under an agreement that the property should be held for the joint benefit of plaintiff and defendant. Defendant denied that the funds for the purchase were provided by plaintiff. Also denied that the funds for the improvement of the property were provided by the plaintiff.

The issues thus presented were found for plaintiff, and as so found we receive them. The case, then, is reduced to this: Plaintiff, the husband of defendant, furnished funds for the purchase of lots, and for the improvement of those lots upon the agreement with his wife, the defendant, that the property so ³⁷ acquired should be held for their joint benefit. The defendant declined to recognize such agreement, and this action was brought to enforce it.

The only evidence to establish this agreement was parol. The gist of the case, then, is this: Plaintiff established a parol

express trust between his wife, the defendant, and himself, and relied upon this for relief. There was no evidence of fraud in bringing about the placing of the title in defendant's name, or in securing the funds from the plaintiff to go into the construction of the improvements. The case presents simply an effort to establish an express or direct trust by parol testimony. This, it has been ruled in this state, cannot be done. We are unable to distinguish in any particular the case from *Davis v. Davis*, 18 Colo. 66, 31 Pac. 499, and upon its authority the case is reversed: See, also, *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883.

Judgment reversed.

Chief Justice Gabbert and Mr. Justice Maxwell concur.

The Creation of Trusts in land by parol is the subject of a recent note to Insurance Co. v. Waller, 115 Am. St. Rep. 774.

MARTIN v. DISTRICT COURT.

[37 Colo. 110, 86 Pac. 82.]

HABEAS CORPUS—Review of Judgment.—A proceeding in habeas corpus to determine the legality of an imprisonment is in the nature of a civil action, and a judgment of an inferior court of record either remanding or discharging a prisoner in such proceeding is reviewable by the supreme court by writ of error. (p. 264.)

HABEAS CORPUS—Review of Judgment by Certiorari.—The supreme court has constitutional power to issue its original writ of certiorari to review a judgment in a habeas corpus proceeding, whether it be civil or criminal, when such judgment is clearly in excess of the jurisdiction of the court rendering it. (p. 264.)

HABEAS CORPUS—Review of Voidable Judgment.—A judgment sentencing a prisoner under an indeterminate sentence statute for a crime committed before such statute went into effect is not void, but at most voidable, and not reviewable by writ of habeas corpus. (p. 265.)

HABEAS CORPUS—Review of Voidable Judgment.—A writ of habeas corpus will not issue to enable a court to review a judgment that is merely voidable, and it is only where the judgment of conviction is wholly void that a prisoner may be released on habeas corpus. (p. 265.)

HABEAS CORPUS—Excessive Judgments—Review.—A merely excessive judgment of a court of general jurisdiction is not void ab initio because of the excess, but is good so far as the power of the court extends, and is invalid only as to the excess, and a person in custody under such sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as is within the power of the court to impose. (p. 266.)

COURTS—Concurrent Jurisdiction—Review of Judgments.—Courts of concurrent jurisdiction have no power to review or supervise by writ of habeas corpus the judgments of one another. (p. 267.)

N. C. Miller, attorney general, I. B. Melville, assistant attorney general, H. A. Lindsley, district attorney, and G. A. Smith, assistant district attorney, for the petitioners.

¹¹¹ CAMPBELL, J. In the district court of Otero county, William Moran was informed against, tried and convicted of ¹¹² the crime of robbery, and in November, 1899, sentenced to confinement in the state penitentiary for not less than twelve nor more than fourteen years. The indictment charged that the crime was committed July 8th of that year. Moran was taken to the state penitentiary and, while serving his sentence, filed, in July, 1902, in the district court of the second judicial district, a petition for a writ of habeas corpus to obtain his release, and as the sole ground for its allowance alleged that the judgment under which he was sentenced was absolutely void, because not within the power of the court to pronounce.

The judgment seems to have been based upon the indeterminate sentence act of 1899, which, it is said, did not become a law until after the crime was committed. The penalty for robbery at the time the offense, as charged in the indictment, was committed, was from three to fourteen years' confinement in the penitentiary. The district court of the second judicial district, where the petition for habeas corpus was pending, discharged the prisoner, apparently for the reason relied upon by him that the judgment under which he was restrained of his liberty was absolutely void as rendered under the wrong law. Though the district court's hasty and improper action has enabled the prisoner to withdraw himself from the state, the attorney general and district attorney are seeking a review of its judgment to the end that the practice in habeas corpus may be established.

We consider, first, the remedy for reviewing the order of discharge. It would seem that, in England, the courts do not say whether a proceeding by habeas corpus is a civil or a criminal one, but the supreme court of the United States considers it a civil proceeding or action to enforce a civil right, and by some courts it is called a "civil cause" or "civil ¹¹³ action": Church on Habeas Corpus, 2d ed., sec. 88; Ex parte

Tom Tong, 108 U. S. 556, 2 Sup. Ct. Rep. 871, 27 L. ed. 826. Other cases deem the proceeding a criminal action. The authorities are collated in 15 American and English Encyclopedia of Law, second edition, 157. The distinction becomes important with reference to a review of a judgment remanding or discharging the petitioner, and in determining whether it exists at all, either by the state or the petitioner, and, if so, whether it must be by writ of error or appeal or certiorari.

At the common law, it seems that no appeal or writ of error was allowed from a judgment in a habeas corpus proceeding remanding or discharging the prisoner: Church on Habeas Corpus, 2d ed., sec. 386. If the proceeding is in the nature of a criminal action, by our statute a writ of error would lie from this court to review a final judgment of an inferior court remanding a prisoner: Gen. Stats. 1883, sec. 972, Criminal Code. If, upon the other hand, it is a civil action, within the meaning of that term as used in the Code of Civil Procedure, a judgment remanding, as well as one discharging, the prisoner is reviewable here on writ of error, since, by section 406 of the code, all final judgments of inferior courts of record may thus be investigated by either party thereto. Our court of appeals, in *McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406, said that the better doctrine in this country is, that such judgments are reviewable by writ of error. In *People v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105, we said, in referring to the *McKercher* case, that the writ does lie to review a judgment of an inferior court determining the custody of an infant.

Though it is not necessary to a decision of this case, we deem it proper to say that, as at present advised, we are inclined to the view that a proceeding in habeas corpus to determine the legality of an ¹¹⁴ imprisonment, like that to determine the custody of an infant, is, at least, in the nature of a civil action, and that a judgment of an inferior court of record in this state either remanding or discharging a prisoner in such proceeding, is reviewable here by writ of error. But if this be not so, it is clear that the supreme court has power, under section 3 of article 6 of the constitution, to issue its original writ of certiorari, as was done here, to review the judgment in this particular case, whether it be civil or criminal, because, as we shall show, the judgment discharging the prisoner was clearly in excess of the jurisdiction of the district court.

In view of our numerous decisions, it seems scarcely necessary to observe that the supreme court, in the exercise of its original jurisdiction, has power by certiorari to review the final judgments of inferior courts which are beyond the jurisdiction of those tribunals to render. Properly there could not have been, and, as a matter of fact, there was not, a bill of exceptions in the district court in this proceeding. For aught that appears to the contrary in this record, though the indictment charged the defendant with having committed the crime before the indeterminate sentence law went into effect, the proof showed that the crime was actually committed thereafter, and, if so, the sentence pronounced would be in accordance therewith. But if we assume, as apparently the district court did, that the crime was committed before that law took effect, and the sentence of imprisonment was wrongly pronounced thereunder, still the judgment sentencing the prisoner was not void, but, at most, voidable.

The weight of authority in the states of the Union is, that a writ of habeas corpus will not issue to enable a court to review a judgment that is merely irregular or erroneous. It is only where a judgment ¹¹⁵ of conviction is wholly void that a prisoner may be released in habeas corpus under a statute like ours: *Ex parte Farnham*, 3 Colo. 545. That statute (Gen. Stats. 1883, sec. 1611) expressly provides that if it appears that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for certain specified causes. It is conceded that the district court of Otero county, which sentenced the prisoner, was legally constituted, and the sole ground upon which relief is sought is that it exceeded the limit of its jurisdiction in that it imposed an improper, excessive and indefinite sentence.

Our later decisions, following that of the supreme court of the United States, are that even where a judgment is wholly void, a defendant will not, except in rare and extraordinary cases, be released from imprisonment thereunder if appropriate relief can be granted by writ of error or appeal: *In re Belt*, 159 U. S. 95, 15 Sup. Ct. Rep. 987, 40 L. ed. 88; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. Rep. 793, 37 L. ed. 653; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. Rep. 785, 37 L. ed. 689; *In re Swan*, 150 U. S. 637; *In re Tyson*, 21 Colo. 78, 39 Pac. 1093; *People v. District Court*, 22 Colo. 422, 45 Pac. 402; *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222.

55 Pac. 1083; *People v. District Court*, 26 Colo. 380, 58 Pac. 608; *In re Mahany*, 29 Colo. 442, 68 Pac. 235; *Church on Habeas Corpus*, 2d ed., sec. 370.

But that doctrine need not be invoked in this proceeding. This sentence is not uncertain as to the minimum length of twelve years. No indefiniteness exists until, at least, that period is passed. We might grant that after the prisoner has served the minimum sentence thus imposed, his confinement thereafter would be illegal, and the courts might release him. The strongest objection that can be urged against this judgment is that it is excessive and indefinite. We have seen that it is not indefinite up to the minimum, and the decided weight of authority ¹¹⁶ is that where a judgment is merely excessive and the court which pronounces it is one of general jurisdiction, it is not void *ab initio* because of the excess, but is good so far as the power of the court extends, and is invalid only as to the excess, and therefore a person in custody under such sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it is within the power of the court to impose. This has been expressly decided by the supreme court of the United States in *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. Rep. 746, 38 L. ed. 631, and in the other cases therein referred to. See, also, *In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 154, 43 N. W. 148, and *In re Graham*, 138 U. S. 461, 11 Sup. Ct. Rep. 363, 34 L. ed. 1051. A case much in point is *In re Pikulik*, 81 Wis. 158, 51 N. W. 261. Other authorities are cited in 15 American and English Encyclopedia of Law, second edition, 171 et seq. From the *Pikulik* case (81 Wis. 158, 51 N. W. 261), we make this quotation, which is pertinent here: "Conceding that the statute under which the petitioner was sentenced is invalid, still he has mistaken his remedy. The municipal court had jurisdiction to try the petitioner for the offense charged, and, on conviction, to sentence him to imprisonment in the state prison therefor. It also had jurisdiction of his person. On the theory that the general sentence statute is invalid, the court merely entered and enforced the wrong judgment. The supposed error is not a jurisdictional one, and hence is not available on habeas corpus; for it is settled law that on habeas corpus the court can only inquire into jurisdictional defects in the proceedings. The remedy is by writ of error."

In the Pridgeon case (153 U. S. 48, 14 Sup. Ct. Rep. 746, 38 L. ed. 631), the defendant applied to be discharged from custody because the sentence imposed was beyond the power and jurisdiction of the court, and therefore void. Such was the claim by respondent Moran in the district court. The supreme court of the United States, in answer ¹¹⁷ to this contention, said that, though the sentence was in excess of what the law permitted, yet it was legal so far as the power of the court imposing it extended, and was only illegal as to the excess, and the prisoner could not be discharged on habeas corpus until he had served so much of the sentence as it was within the power of the court to impose.

These decisions are applicable here, and our conclusion is that the sentence complained of is not void, but, at most, voidable, and might be corrected upon a writ of error, and since the prisoner has not served out the sentence which it was within the power of the court to render, he was not entitled to a discharge on habeas corpus. The district court, in ruling otherwise, clearly exceeded the limit of its jurisdiction in discharging the prisoner, and its judgment for that reason should be set aside.

For another reason that court exceeded its jurisdiction in the premises. The sentence under which the prisoner was in custody was pronounced by the district court of Otero county. That court had jurisdiction of the crime and of the person of the defendant, and the power to pronounce sentence. The district court of Arapahoe county is a court of concurrent jurisdiction only. It has no power under the constitution or the statutes of this state to review or supervise by habeas corpus the judgment of the district court of another judicial district. This was clearly intimated by Mr. Justice Elliott in his concurring opinion in *Cooper v. People*, 13 Colo. 337, 22 Pac. 790, 6 L. R. A. 430. He there said that, notwithstanding the fact that our statute confers jurisdiction in habeas corpus cases upon district courts and district judges, yet, in the nature of things, there must be some limitation to the exercise of such power, else the unseemly spectacle might be presented of one district court releasing prisoners committed by another district ¹¹⁸ court, or even by the supreme court itself. This is precisely what the district court of the second judicial district has assumed to do in this case, and it was beyond its jurisdiction to do so. In *People v. District*

Court, 22 Colo. 422, 45 Pac. 402, Mr. Justice Goddard, speaking for the court, said: "The writ of habeas corpus cannot be used as a writ of error, nor will one court review the proceedings of another court of concurrent jurisdiction in that manner."

In *People v. District Court*, 26 Colo. 380, 58 Pac. 608, it was held that the district court has no jurisdiction on a writ of habeas corpus to review a conviction for a misdemeanor in the county court on the ground that the statute under which the conviction was had, or the statute conferring jurisdiction on county courts in misdemeanor cases, is invalid. The ground of the decision was that, since the district court did not have the power on appeal or writ of error to review judgments of county courts in misdemeanor cases, it could not, by habeas corpus, inquire into the legality or justice of a judgment or decree of the county court in such cases. That decision is clearly authority for the proposition that in this state the district court of one district may not, by habeas corpus, inquire into the validity, legality or justice of a judgment of a district court of another district: See *People v. District Court*, 33 Colo. 328, 108 Am. St. Rep. 98, 80 Pac. 888.

For the foregoing reasons we conclude that the district court of the second judicial district, in discharging the prisoner on habeas corpus, exceeded the limits of its jurisdiction, and proceeded in palpable violation of the provisions of the habeas corpus statute and the previous decisions of this court.

We feel it our duty to refer with emphatic disapproval to the action of the district court in discharging ¹¹⁹ the prisoner against the protest of the district attorney, who appeared for the warden, and who stated that he wished to have the judgment of the district court reviewed by the supreme court, without affording any opportunity to that officer to do so before the flight of the prisoner. The district court refused to withhold its judgment discharging the prisoner until the district attorney had time to apply to this court for relief, but immediately after the hearing on a Saturday, and before the application could be made here, discharged the prisoner, and enabled him to get beyond the jurisdiction of the court before any redress could be had of the wrong done to public justice. This action was unseemly. It enabled a prisoner who had been convicted by a jury and sentenced by a court of competent jurisdiction to escape punishment for the com-

mission of a crime of which we must assume he was guilty. There can be no excuse for such action.

The writ is allowed, and the judgment of discharge must be set aside.

Writ granted.

Chief Justice Gabbert and Mr. Justice Steele concur.

The Writ of Habeas Corpus is unavailable to a prisoner after a final judgment of conviction, unless the judgment is void as distinguished from voidable merely: *Younger v. Hehn*, 12 Wyo. 289, 109 Am. St. Rep. 986; *Ex parte Kair*, 28 Nev. 127, 113 Am. St. Rep. 817; *Bronk v. State*, 43 Fla. 461, 99 Am. St. Rep. 119. As to whether an excessive sentence is void within this rule, see the note to *Koepke v. Hill*, 87 Am. St. Rep. 194; *Ex parte Cox*, 3 Idaho, 530, 95 Am. St. Rep. 29. A judgment of imprisonment for less than that prescribed by statute is not void: *In re Reed*, 143 Cal. 634, 101 Am. St. Rep. 138.

The Review of Decisions in Habeas Corpus proceedings by certiorari is discussed in *State v. Whitcher*, 117 Wis. 668, 98 Am. St. Rep. 968, and cases cited in the cross-reference note thereto.

WOOD v. McCOMBE.

[37 Colo. 174, 86 Pac. 319.]

TAXATION OF MINING PROPERTY, Title to Which Remains in the United States.—A statute may authorize the taxing of mining property which has not been patented, and the title to which remains in the United States, and the right to the possession in the property passes to the purchaser at the tax sale. (p. 273.)

LIMITATIONS OF ACTIONS to Recover Property Purchased at Tax Sales.—Under the statutes of Colorado no action can be maintained for the recovery of land which has been sold for taxes, unless brought within five years after the execution and delivery of the tax deed as against one who has been in possession during the full period of five years from the recording of such deed. (p. 276.)

Charles Cavender, for the appellants.

George R. Elder, pro se.

175 MAXWELL, J. December 31, 1884, Peter Finnerty and Wilhelmina Gude, owners of the Comstock lode mining claim, Lake county, Colorado, entered the same for patent in the United States land office at Leadville, Colorado, and a receiver's receipt for mineral entry No. 2411 for nine and sixty-seven hundredths acres was issued to them therefor.

May 2, 1887, the commissioner of the general land office held for cancellation one and eighty hundredths acres of the entry, which area was not included in the application for patent, by reason of the fact that such area was ¹⁷⁶ in conflict with the Idaho lode mining claim, United States survey No. 667.

December 12, 1894, the commissioner of the general land office canceled mineral entry No. 2411 for failure to furnish certain proofs required by the department.

December 21, 1896, by order of the commissioner of the general land office, the entry of the Comstock lode was reinstated as to seven and eighty-eight hundredths acres, excluding however, the area in conflict with the Idaho, one and eighty hundredths acres, for which last-named area a supplemental application for patent was allowed and ordered.

Pursuant to this last order, June 19, 1897, appellants filed a supplemental application for patent for that portion of the Comstock included within the boundaries of the Idaho, being one and eighty hundredths acres.

August 19, 1897, John McCombe filed in the United States land office at Leadville, Colorado, his protest and adverse claim against such supplemental application for patent, and September 17, 1897, commenced this action against appellants in support of such adverse claim, alleging in his complaint that he was the owner of an undivided one-third interest in the Comstock, from which appellants had ousted him and unlawfully and wrongfully detained possession thereof from him, including that portion of the Comstock covered by the supplemental application for patent, to wit, one and eighty hundredths acres; that the action was in support of his adverse claim theretofore filed in the land office, and to recover possession of plaintiff's one-third interest in the Comstock.

Mr. McCombe died. His administratrix and heirs at law were substituted as plaintiffs. Thereafter, one Samuel McMillen was made a party plaintiff, and upon the suggestion of his death, George R. Elder, successor in interest, was substituted. June 4, 1901, Tingley S. Wood, one of the defendants and ¹⁷⁷ appellant here, filed his answer denying the material averments of the complaint and affirmatively pleading title to an undivided one-third interest in the Comstock, in himself, under and by virtue of a tax deed dated August 8, 1892, recorded August 11, 1892, which tax deed was issued by the county treasurer of Lake county to one C. T. Carna-

han and the property thereby conveyed to Carnahan, subsequently conveyed to Mr. Wood; that such tax deed was based upon a tax sale of the interest of Wilhelmina Gude in the Comstock lode made August 5, 1889, for delinquent taxes assessed against the property for the year 1888; the statute of limitations, Mills' Annotated Statutes, section 3904, possession in himself and grantor, and payment of taxes since 1892, were also pleaded.

July 21, 1902, Mr. Elder filed a reply denying the material affirmative allegations of Mr. Wood's answer, and upon numerous grounds attacked the validity of the tax deed title relied upon by Mr. Wood. The principal grounds of such attack are, that in 1888, the year when the property was assessed under which the sale for delinquent taxes was made, the title was in the government of the United States and the property was not subject to assessment or taxation; that the advertisement of the tax sale was made by publication in the Sunday issue only of a newspaper, and therefore invalid, and the subsequent proceedings thereunder void; that the payment of all taxes subsequent to such sale was without force or effect, for the reason that the title being in the government, the assessment of the property and its taxation was without authority; that one and eighty hundredths acres included in the assessment of the property never was a part of the property, and that the inclusion of such area in the assessment and taxation rendered the whole assessment void.

¹⁷⁸ By stipulation the reply of Mr. Elder stood as the reply of the heirs of Mr. McCombe.

A trial to the court without a jury resulted in a decree in favor of plaintiffs and against defendant, Wood, for an undivided one-third interest in the Comstock lode mining claim, United States survey No. 3613, an undivided one-third interest in that portion of the Comstock in conflict with the Idaho, to wit: one and eighty hundredths acres, that Mr. Wood had no interest whatever in the Comstock, and that the tax deed to Carnahan and Carnahan's deed to Wood were invalid and void.

Two questions decisive of this appeal are presented by this record: 1. Are mining claims in this state, which have not been patented or entered for patent, subject to taxation? 2. Had the bar of the statute of limitations (Mills' Ann. Stats., sec. 3904), run in favor of appellant Wood before the commencement of this action?

1. The General Assembly, at its session of 1887, enacted legislation for the taxation of mines and mining property, the first section of which is: "All mines and mining property of the class heretofore exempted by the constitution of the state of Colorado shall hereafter be assessed and taxed, and the taxes levied enforced by sale of the property taxed, in default of payment, in the same manner as is now or may be provided by law, in the case of other classes of taxable real estate."

Section 2 provides a form for the description of such property for the purposes of taxation and assessment.

Section 3, construed with section 1, classifies all mines and mining property and possessory rights therein, for the purpose of assessment and taxation, into those producing during the fiscal year an amount ¹⁷⁹ exceeding one thousand dollars, and those producing less than that amount or nothing at all.

Section 4 provides: "In case the mine or mining claim shall not be patented, or entered for a patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado": Laws 1887, pp. 340, 341; Mills' Ann. Stats., secs. 3222-3225.

This statute was under consideration by this court in *People v. Henderson*, 12 Colo. 369, 21 Pac. 144, and its meaning construed. Mr. Chief Justice Helm, writing the opinion of the court, said:

"Section 1 of the act before us contains an express legislative declaration that, after the adoption thereof, mines and mining claims bearing precious metals shall be taxed for revenue. All such property, regardless of its tenure—that is, whether held under patent, application for patent, or mining location, and regardless of the question as to whether the value thereof be much or little—is clearly and unequivocally subjected to taxation.

"In effect, sections 1 and 3 of the act, taken together, divide this species of property into two classes, viz.: First, the mines or mining claims referred to in section 3, i. e., those which during the preceding fiscal year have had a gross output aggregating upward of one thousand dollars in value;

and second, all the remaining or nonproducing claims, without reference to value."

In summing up, the conclusions are stated as follows:
180 "Therefore by the act in question, we are advised: First, that all mines and mining claims containing precious metals are subjected to taxation; second, that this species of property is divided into two classes, viz., those mines producing upward of one thousand dollars during the fiscal year preceding, and those producing less than that sum or nothing at all; and, third, that a specific method is provided for the valuation of mines belonging to the first class while all mines and claims included in the second class are to be assessed in the manner indicated by law for the assessment of other taxable real estate."

In *Pilgrim C. M. Co. v. Teller County*, 32 Colo. 334, 76 Pac. 364, the doctrine above announced is approved.

It is therefore settled in this state, under Laws of 1887, that all mines and mining property bearing precious metals, regardless of its tenure—that is, whether held under patent, application for patent or mining location—are subject to taxation. By section 4 of the act, *supra*, the possession is the subject of assessment, and a sale to enforce payment of delinquent taxes, under the general revenue laws of the state, passes the title and right of possession to the purchaser.

11. Section 3904, Mills' Annotated Statutes, relied upon by appellant as a bar to this action is: "No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding."

Under section 3902, Mills' Annotated Statutes, a tax deed executed by the county treasurer in his official capacity, properly attested, acknowledged and recorded vests in the purchaser all the right, title, interest and estate ¹⁵¹ of the former owner in and to the land conveyed, and is made *prima facie* evidence of the following facts:

"First. That the real property conveyed was subject to taxation for the year or years stated in the deed.

"Second. That the taxes were not paid at any time before the sale.

"Third. That the real property conveyed had not been redeemed from the sale at the date of the deed.

“Fourth. That the property had been listed and assessed at the time and in the manner required by law.

“Fifth. That the taxes were levied according to law.

“Sixth. That the property was advertised for sale in the manner and for the length of time required by law.

“Seventh. That the property was sold for taxes as stated in the deed.

“Eighth. That the grantee named in the deed was the purchaser or the heir at law, or the assignee of such purchaser..

“Ninth. That the sale was conducted in the manner required by law.”

To the introduction of the tax deed under consideration, appellees interposed an objection based upon seven grounds, not one of which assailed the deed for invalidity upon its face; that is, for such invalidity as appears upon the face of the deed, without the aid of evidence aliunde. Although the deed is not set forth in the abstract of record, we have examined it with care as it appears in the transcript, and conclude that it is not subject to the objection that it is invalid upon its face, although counsel for appellee Elder repeatedly states in his printed argument and brief that it is void upon its face.

¹⁸² In *Sullivan v. Collins*, 20 Colo. 528, 39 Pac. 334, in considering the force and effect of the statute (Mills' Ann. Stats., sec. 3904), this court said: “The statute is for the purpose of protecting claimants under tax deeds, and to that end it is provided that an action by the owner shall be barred if not brought within five years after the sale thereof.”

In *Williams v. Conroy*, 35 Colo. 117, 83 Pac. 959, from the statement of facts it appears that plaintiff relied upon tax deeds which were recorded and under which he held for more than five years without any action by the original owner or any other person in any way questioning that title. Defendant claimed title, first, under tax deeds which were recorded less than five years, but under which actual possession was not taken by him for more than five years after the date of recording of plaintiff's tax deed, and, second, by virtue of a quitclaim deed executed and delivered by the original patentee owner in February, 1902, and which was after this action was begun and before the amended answer was filed. It also appears that the tax deeds of both plaintiff and defendant were regular and valid upon their face, but by reason

of informalities in the sale, as matter of law, they were both void. The court said, Mr. Justice Campbell writing the opinion:

“The defendant obtained nothing by his quitclaim deed, for section 3904, Mills’ Annotated Statutes, says that no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of a deed therefor by the treasurer, any law to the contrary notwithstanding. More than the full period of five years prescribed by this act of limitation had expired without any act of any sort by the patentee owner to recover possession or to question plaintiff’s title under his tax deed. The quitclaim deed gave to the ¹⁸³ defendant such rights, and such only, as the grantor himself had. The patentee owner’s title, under section 3902, Mills’ Annotated Statutes, was completely extinguished and barred; hence the patentee had nothing to give when he executed his quitclaim deed, and the defendant received nothing thereby. Express authority for this conclusion is found in *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224, 47 Pac. 296, *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244, and *Bennet v. North Carolina & I. Co.*, 23 Colo. 470, 85 Am. St. Rep. 281, 48 Pac. 812, which hold that a void deed, taken in good faith, constitutes sufficient color of title under our statute of limitations: See, also, *Desty on Taxation*, sec. 149. That the patentee’s title was extinguished, and the same vested in the plaintiff under the facts of this case, see, also, *Lebanon Min. Co. v. Rogers*, 8 Colo. 34, 5 Pac. 661; *Moingona Coal Co. v. Blair*, 51 Iowa, 447, 1 N. W. 768; *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044; *Griffin v. Turner*, 75 Iowa, 250, 39 N. W. 294; *Black on Tax Titles*, 2d ed., sec. 284; *Shawler v. Johnson*, 52 Iowa, 473, 3 N. W. 604.

“*Morris v. St. Louis Nat. Bank*, 17 Colo. 231, 29 Pac. 802, is not opposed to this conclusion. There are some observations in the opinion, in the nature of dicta, which might seem pertinent, but the holding was that the statute of limitations we are considering was not applicable to that case, as the action was not ‘for the recovery’ of land, and the deed had not been on record for five years before the action was brought.”

It appears from the record that McCombe and McMillen acquired by deed the interest of Wilhelmina Gude in the property, two years and four months before the bar of the statute attached, during which time no action was taken by

them, or either of them, to test the validity of the tax deed, while Mr. ¹⁸⁴Elder's deed from Mr. McMillen was dated two years and two months after the bar of the statute had attached, and about two years after this suit was commenced.

Mr. Elder's grantor had no title in the property to convey at the time he made his deed, the same having been completely extinguished and barred under section 3904, Mills' Annotated Statutes: *Williams v. Conroy*, 35 Colo. 117, 83 Pac. 959.

Our conclusions are, that under and by virtue of sections 3222-3225, Mills' Annotated Statutes, the Comstock lode was subject to assessment and taxation in the year 1888; that the taxes assessed against the same being delinquent in 1889, the property was subject to sale in that year; that the tax deed issued by the county treasurer August 8th, and recorded August 11, 1892, was authorized, and not being invalid upon its face, was prima facie evidence of the matters stated in section 3902, Mills' Annotated Statutes, *supra*; that the title and right of possession of McCombe and McMillen vested thereby in the purchaser, Carnahan, and was by him conveyed to Mr. Wood, and that no action for the recovery of the title conveyed by such tax deed could be maintained against one who had been in the possession of the premises under such tax deed during the full period of five years from the date of the record of the tax deed, at the time this suit was commenced, under section 3904, Mills' Annotated Statutes, *supra*.

The judgment and decree must be reversed and the cause remanded, with instructions to vacate the same, and enter judgment for appellant Wood, for possession of the premises according to the prayer of his answer.

Chief Justice Gabbert and Mr. Justice Gunter concurring.

By Writ of Error the Judgment in the Principal Case was taken for review to the supreme court of the United States, where it was affirmed on the ground that the plaintiffs in error had shown no violation of federal right, and that the effect of the judgment did not extend to the title held by the United States. The opinion of affirmance, written by Mr. Justice Moody, is as follows:

“The plaintiffs in error brought this action in a district court of the state of Colorado to recover from the defendants in error the possession of an undivided interest in the Comstock lode mining claim, situated in that state. Both parties claimed title under Wilhelmina Gude, who was agreed to have been the owner of the interest in dispute; the defendants under a sale for taxes assessed

upon her interest, made August 5, 1889, and a deed in pursuance of the sale, made August 8, 1892, and recorded August 11, 1892; the plaintiffs under a quitclaim deed of her interest, made April 5, 1894, and duly recorded. The tax title was the earlier, and possession of the interest in dispute was held by those claiming under that title for more than five years, which is the period of the statute of limitations of Colorado, applicable to such a case. The plaintiffs, however, insisted that the tax title was void, and the judge of the trial court so found, and entered judgment for the plaintiffs, which was reversed by the supreme court of the state and judgment for the defendants ordered. The case is here upon writ of error to the latter court.

“The plaintiffs’ contention is that the tax title was void for two reasons: First, because the property was not subject to state taxation, as the title to the land was in the United States, and therefore the levy of the tax was a nullity; second, because the notice of the sale for taxes was published only in a Sunday newspaper, and therefore the sale was a nullity. The further contention is then made that the tax deed, for these reasons, was void, and did not afford color of title sufficient for the purpose of the statute of limitations.

“The judgment under review, however, determined that the interest of Wilhelmina Gude was liable to taxation under the laws of the state, although the land on which it was located had not been patented to her or entered for patent by her; that the possession was the subject of the assessment, and that the right of possession passed by the tax sale; that a tax deed was, by a state statute *prima facie* evidence *inter alia* ‘that the property was duly and lawfully advertised for sale’; that the tax deed was not void upon its face, and that it constituted a sufficient color of title to satisfy the statute of limitations; and, finally, that, as this action was not brought within five years after the delivery of the tax deed, it was barred by that statute, which provided that ‘no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer.’

“The question for decision here is only whether this judgment denied to the plaintiffs any federal rights duly claimed by them in the state court, and we have no right to inquire further.

“1. The title to the land on which this mining claim was located was in the United States. It was a part of the public lands, and although proceedings had been begun by the owners of the claim for the acquisition of the title to the land by patent, they were not concluded at the time of the assessment of the tax, and apparently no patent has ever been issued. Obviously the land was not taxable as the property of Wilhelmina Gude. The act by which the people of the territory of Colorado were enabled to form a state (section 4 of act approved March 3, 1875; 18 Stats. at Large, 474, c.

139) provided that no taxes should ever be imposed upon lands or property of the United States. The claim of a federal right was based upon this statute. But, assuming that under this statute a federal question is raised, there was no taxation of the land in the case at bar. A statute of Colorado authorized the taxation of mining claims, whether patented or entered for patent or not, in these words: 'In case the mine or mining claim shall not be patented, or entered for a patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado': Laws 1887, secs. 340, 341; Mills' Ann. Stats., secs. 3222-3225. The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the supreme court of the state, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself; that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock lode was a 'valid subsisting mining location,' and, at the time of the assessment of the tax, Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable, and taxable: *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532; *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 171 U. S. 650, 19 Sup. Ct. Rep. 61, 43 L. ed. 320; 1 *Lindley on Mines*, secs. 535 to 542, inclusive. The state, therefore, had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States.

"2. The tax deed under which the defendant in error Wood claims title was executed in pursuance of a sale made upon a notice published only in a Sunday newspaper. This fact does not appear from the deed itself, as an analogous infirmity appeared in the tax deed before the court in *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. Rep. 83, 33 L. ed. 327. The deed upon its face was a valid instrument, and could be impeached only by evidence aliunde. The state court did not deem it necessary to consider whether such a notice was sufficient, because it held that a state statute made such a deed prima facie evidence of the sufficiency of the notice, and that possession under such a deed for the prescribed period met the requirements of the state statute of limitations. The decision, therefore, did not reach the only federal question which can be imagined with respect to this part of the case, namely, that a sale upon such a notice

was wanting in due process of law, but rested upon entirely adequate grounds of a nonfederal nature. Whether the decision of the question of state law was right or wrong, we may not consider. It is enough that the judgment proceeded solely upon the state law, and that the state law was adequate to dispose of the case without reaching any federal question: *Leathe v. Thomas*, 207 U. S. 93, 28 Sup. Ct. Rep. 30. We need not, therefore, consider whether this federal question was properly raised in the court below, or whether a sale upon such a notice would be a denial of due process of law, in violation of the fourteenth amendment of the constitution.

“The plaintiffs in error have shown no violation of federal right, and the judgment of the supreme court of Colorado is affirmed”: *Elder v. Wood*, 000 U. S. 000, 28 Sup. Ct. Rep. 263, 00 L. ed. 000.

BURKART v. MEIBERG.

[37 Colo. 187, 86 Pac. 98.]

WATERS AND WATER RIGHTS.—Appropriation of Surface Water.—If one owner, by constructing a ditch upon his own land parallel with the boundary line between himself and his adjoining owner, has for a number of years intercepted the surface drainage from the adjoining owner's land and used it for irrigation purposes, this does not constitute a valid appropriation of such water, so as to prevent the adjoining owner from constructing on his own land a ditch parallel with the other, thus intercepting such surface water and carrying it around the land of the first ditch owner to irrigate another tract of land of the adjoining owner; and it is immaterial that the latter owner has conditionally sold the adjoining tract, and has with the consent of his vendee continued to use such water upon his other tract. (p. 280.)

WATER AND WATER RIGHTS—Waste Water—Appropriation.—Surface water, so long as it remains on the lands of a person and is by him used for irrigation purposes, is not waste water, and does not, in any event, become such until it has escaped and reached the land of another, and until then, the latter cannot make a valid appropriation of it. (p. 281.)

King & Stewart and R. M. Logan, for the appellants.

W. R. Welch, for the appellee.

¹⁸⁷ CAMPBELL, J. The plaintiff and defendant own adjoining tracts of land, that of the plaintiff lying to the west of the ¹⁸⁸ defendants, the natural slope of which is in that direction. The defendants own valid water rights in several ditches which have their headgates in a natural stream, and

with the water thus diverted they had for a number of years irrigated their tract of land in question. In the process of spreading water upon it some of it, by surface drainage, has passed across, and escaped therefrom, and reached the land owned by the plaintiff, and is there collected by her, and by means of an irrigating ditch, running parallel with the common boundary line, she has used this water in raising crops. Plaintiff first began such use about the year 1890, and so continued until the year 1903, when the defendants dug a parallel ditch, entirely upon her own land, a short distance from the boundary line, and thus intercepted the water which had been spread upon their land farther to the east, but which, in the process of irrigation, had not soaked into or passed beneath the surface, and the water thus intercepted by the defendants they carried by means of a ditch around the plaintiff's body of land, and irrigated other lands owned by them to the west of plaintiff's tract.

The question for decision is whether the plaintiff has made a valid appropriation of waste water as against the defendants, or whether the defendants have a right, as against plaintiff, to intercept upon their own land, and before it passes therefrom, water which has been spread upon the same but not entirely consumed in the process of irrigation.

It will be observed from the foregoing statement that it is only to such water as has actually escaped from defendants', and reached her own, lands that plaintiff makes claim. Her ditch is built entirely upon her own lands, and the point of diversion of the waste water is also situate thereon, and not on defendants' property. She does not claim ¹⁸⁹ water which, by seepage or percolation, first arises upon her own lands after having been applied to the irrigation of other lands, hence section 2269 of Mills' Annotated Statutes does not apply.

It is manifest that, as against the defendants, the plaintiff has not made a valid appropriation of this alleged waste water. Just what constitutes waste water in every instance we do not decide, but it is unquestionably true that, so far as concerns the right to make a valid appropriation of it, this water is not waste water so long as it remains upon the lands of the defendants, and does not, in any event, become such until it has escaped and reached the lands of others. The plaintiff certainly has acquired no vested right to compel the defendants to apply the waters, the right to the use of which they own, in such a way as that some of it will not soak into their

own ground, but escape and pass from the surface onto her lands. The defendants have the right to change the place and manner of use, or reduce the quantity applied to their lands, so that no water whatever will escape and reach the lands of plaintiff. Whether the waste water, which the plaintiff for a series of years has utilized, has reached her land as a result of an improper or extravagant use which the defendants have made of their own appropriation, or whether it is the result of a proper method of irrigation due to the topography of the country, or some peculiar local condition, does not appear from the evidence, and is a matter of no material moment, so far as concerns the rights of the parties litigant. So long as and while the water which is applied by defendants to the irrigation of their lands remains upon the same, it is, as against the plaintiff, their exclusive property, whatever may be the rights of plaintiff as against some other claimant to it as waste water. Certainly, defendants could turn ¹⁹⁰ into their laterals from the main ditch, lying farther to the east, less water than they have been wont to do, or apply it in such a way that all of it will sink into the ground before it reaches the boundary line of the two tracts; or they might turn into their laterals the full head to which they are entitled, and before it reaches and is applied to the portion of the land immediately adjoining plaintiff's, turn all, or a portion of it, into some other lateral, or some other ditch, and use it upon an entirely different tract of land, and thus prevent a drop from running into plaintiff's ditch.

The plaintiff does not assert the right to the use of this water by virtue of an appropriation made from the same stream, or any of its tributaries, which are the source of defendant's supply. She cannot, therefore, like a prior or junior appropriator of water from the same stream, insist upon an economical use by the defendants of their appropriation. If the defendants have no present or immediate need of the full quantity of water which they may divert and use, they cannot waste it, but it is their duty to allow such portion as they have no immediate need for to remain in the natural stream, or, if diverted, to return such surplus again into the same stream, where, unless they then intend to recapture it, it becomes subject to diversion by the various ditches, in accordance with their numerical priorities: *Le Jara Creamery etc. Co. v. Hansen*, 35 Colo. 105, 83 Pac. 644.

After defendants' appropriation has done duty to their own land, they cannot, even by grant, confer upon plaintiff the right to use it, or any of it, as against the superior claims of other appropriations from the same stream. By mere acquiescence on their part to plaintiff's use, after waste water has passed from their lands, they have not estopped ¹⁹¹ themselves thereafter to intercept and make beneficial use of it before it escapes from their control. And if such further use may be restrained by another appropriator from the same source of supply, plaintiff cannot assert any such equity.

The plaintiff makes the point, however, that before this action was begun, the defendants had sold their adjoining tract of land, and consequently have lost their rights to any surplus or waste water that might be intercepted upon the same before it reaches the lands of plaintiff. If such sale was made, we do not see how plaintiff's position is thereby strengthened. Defendants did make a conditional sale of their land before suit was brought, but no conveyance thereof was made, and will not be until the conditions of the sale are fully performed by the vendee. With that the plaintiff has no concern. But if a sale and conveyance were so made, the rights of defendants' vendee to this surplus or waste water are paramount to the rights of plaintiff, for the reasons hereinabove given, and the record shows that the interception and use of it by defendants upon another tract have been with their vendee's consent.

Since, therefore, plaintiff has not, as against defendants, made a valid appropriation of this so-called waste water, or water which by surface drainage might, if not intercepted by them, reach her lands, but, on the contrary, as between the parties hereto, the superior right to its use, when collected upon the lands of the defendants, and before it reaches her lands, belongs to them, the decree of the lower court awarding the prior right to the plaintiff cannot stand.

No case has been called to our attention by counsel, and we have found none, in which the important question here discussed has been decided, but upon ¹⁹² general principles we think the conclusion reached is sound. The case most nearly in point is *Fairplay Hydraulic Min. Co. v. Weston*, 29 Colo. 125, 67 Pac. 152. There the defendant mining company had acquired by appropriation the right to the use of water for placer mining purposes. Subsequently the plaintiff's grantor

went upon the placer ground and below the flume and dump of the placer mine constructed a ditch into which the water, after it had been fully utilized by the defendant for placer purposes, and before it had reached the natural stream, was diverted and used by plaintiff and his grantors to irrigate agricultural lands. While the defendant acquiesced in this action of the plaintiff and his grantor, it did so with the understanding that they should not assert, as against the defendant, any legal right thereto, or in any way interfere with the operation of the placer. At a still later date the defendant turned a large volume of water into its ditch, and so used it in placer mining that it fouled the water at the point where the plaintiff had diverted the flow for the purpose of irrigation. The court held that the plaintiff was not entitled to any relief as against this last act of defendant, because plaintiff and his grantor must be considered mere licensees, and acquired no such rights to the use of water as would authorize relief by injunction restraining defendant from polluting it. So far as that case has any bearing upon the present one, it is in favor of the defendants.

There is another, and entirely distinct, matter of dispute between the parties concerning the attempt by the plaintiff to use certain other waters through the Bloxin ditch. The decision of the trial court respecting it was in favor of the defendants, and our investigation leads us to believe that it was right.

193 The decree of the lower court, therefore, should be reversed and the cause remanded, with instructions to vacate so much of the former decree as bears on the rights of the parties to the so-called waste water, and to enter a new decree in favor of the defendants upon both points in controversy, and in accordance with the views expressed in this opinion.

Chief Justice Gabbert and Mr. Justice Steele concur.

The Question Passed upon in the Principal Case has not, so far as our investigation has extended, been before the courts of other jurisdictions for adjudication.

DUCEY v. PATTERSON.

[37 Colo. 216, 86 Pac. 109.]

APPEAL AND ERROR—Jurisdiction—Disposition of Cause.—

The supreme court has power to interpret the legal effect of a stipulation on file, and to declare as fully paid a judgment brought up by writ of error, and which has been released as to a portion of the joint judgment debtors by such stipulation. (p. 287.)

JOINT TORT-FEASORS—Effect of Release of One.—The satisfaction of a judgment against one of several joint tort-feasors bars an action against the others, although such release and satisfaction shows upon its face that it was not intended to release them. (p. 288.)

JUDGMENTS—Satisfaction of as to One Joint Tort-feasor—Effect on All.—A stipulation between a judgment creditor and a portion of the judgment debtors, who are all joint tort-feasors, that a settlement has been made of all questions between them, and that the judgment is hereby satisfied and discharged as to such portion of the debtors, but not waived or canceled as to another joint judgment debtor, and that a writ of error may be dismissed, does not constitute a covenant not to sue, but is a release of the judgment as to all of the joint tort-feasors. (p. 290.)

CONSTITUTIONAL LAW—Ex Post Facto Law.—A statute providing that a release of one or more joint debtors shall not release the remaining debtors does not apply to a release of a portion of the joint debtors under a judgment rendered before the statute went into effect, and which the unreleased judgment debtor has a right to have first satisfied out of the property of the released judgment debtors. To construe such statute to apply in such case would violate a constitutional provision "that no ex post facto law . . . or retrospective in its operation, . . . shall be passed by the General Assembly." (p. 291.)

C. J. Hughes, Jr., T. S. Dines and J. G. McMurray, for the plaintiffs in error.

Richardson & Hawkins, for the defendant in error.

217 MAXWELL, J. Material parts of the judgment in this case are as follows:

"It is therefore by the court ordered, adjudged and decreed that the plaintiff, Thomas M. Patterson, recover of the defendants, Patrick Ducey, Ellen G. Ducey and Winfield S. Stratton, the sum of two thousand dollars and all the costs in the cause in this behalf expended, and it is ordered that execution issue, as provided by law, for the collection of said amount.

"And it is further ordered, adjudged and decreed that the defendants, Patrick Ducey and Ellen G. Ducey, transfer and

deliver to the plaintiff within thirty days from the date of this decree, seventy-five ²¹⁸ hundred shares of the said fifteen thousand shares of the capital stock of The Portland Gold Mining Company, together with an assignment of all dividends declared on said seventy-five hundred shares of stock, since the 8th day of January, A. D. 1897, that being the date of the injunction in this cause."

The judgment was rendered July 3, 1899. July 9, 1899, an act of the General Assembly entitled, "An Act to allow the release of joint debtors," went into effect: Sess. Laws 1899, p. 239; 3 Mills' (Rev.) Stats., sec. 2528a. The first section is as follows: "A creditor of joint debtors may release one or more of such debtors, and such release shall operate as a full discharge of such debtor or debtors so released, but such release shall not release or discharge or affect the liability of the remaining debtor or debtors. Such release shall be taken and held to be a payment in the indebtedness of the full proportionate share of the debtor or debtors so released."

August 10, 1905, there was filed in this court the following (after the title of the cause):

"In the above styled cause it is hereby stipulated and agreed that a settlement of all existing controversies between the defendant in error, Thomas M. Patterson, and the administrators, representatives and heirs of Patrick Ducey, deceased, and Ellen G. Ducey, deceased, has this day been made, and that the judgment rendered by the district court of Arapahoe County, on the 3d day of July, 1899, which judgment decreed that the said Patterson recover of said Patrick Ducey and Ellen G. Ducey and one Winfield S. Stratton, the sum of \$2,000 and costs of action, and also decreed that the said Patterson was the equitable owner of 7,500 shares of the capital stock of The Portland Gold Mining Company, and ordered ²¹⁹ that said stock be delivered to the said Patterson, together with an assignment of all dividends declared on said stock since the 8th day of January, 1897; and to reverse which judgment the writ of error in the above styled cause was sued out, has this day been satisfied, and is hereby satisfied and discharged, so far as it was rendered against the said Duceys.

"It is further stipulated that the writ of error, so far as the same was sued out by or on behalf of the said Duceys, may be, and the same is hereby, dismissed, neither party hereto to recover any costs against the other, and that the court may make

such entries or orders of record as are necessary to carry into effect this judgment.

“The defendant in error, by the signing of this stipulation, does not waive, relinquish or cancel the said judgment so far as it is against the said Winfield S. Stratton, but only acknowledges satisfaction of said judgment so far as the said Duceys are concerned.

“This July 10th, 1905.

“CHARLES J. HUGHES, JR.,

“Attorney for the Administrators and Heirs of Patrick Ducey and Ellen G. Ducey.

“RICHARDSON & HAWKINS,

“Attorneys for Defendant in Error.”

It will be observed that the foregoing act went into effect six days after the rendition of the judgment herein.

The executors of the last will and testament of Winfield S. Stratton, deceased, who have been substituted for said Stratton, move to dismiss the writ of error herein and to declare the judgment of the court below fully paid, performed and satisfied as to ²²⁰ the estate of Stratton, by reason of the stipulation filed herein by defendant in error, above set forth.

Defendant in error joins in the motion to dismiss the writ, but denies the authority of the court to satisfy the judgment, upon the grounds: 1. That the court is without jurisdiction to make such order; 2. That the stipulation and settlement between the Duceys and defendant in error does not release the Stratton estate under the common law; 3. That the release is within the purview of the statute above quoted, and its force and effect controlled thereby.

1. The first contention is disposed of by *Atkinson v. Tabor*, 7 Colo. 195, 3 Pac. 64, wherein appellees moved to dismiss the appeal upon the ground, inter alia, that appellants, since taking the appeal, availed themselves of a large portion of the money deposited as purchase money of the mines involved in the litigation, and thus waived their right to have the judgment appealed from reviewed on appeal. The court held:

“Matters may occur, subsequent to judgment, which operate to waive the right of a party to have the judgment reviewed on appeal, or upon writ of error. When such matters appear of record, the objection is properly raised by a motion to dismiss; but when they do not so appear, the objection must be raised by a plea in bar of the proceedings in

error: Powell on Appellate Proceedings, p. 121, sec. 12a, and authorities cited.

“We entertain no doubt of the general proposition that it is inconsistent with the principles of justice and the rules of law, to permit a party, who has voluntarily taken advantage of a judgment rendered at nisi prius, to afterward prosecute proceedings to reverse it.

“Neither have we any doubt of the jurisdiction of this court—when such conduct of a litigant before ²²¹ it is properly alleged, and the matter does not appear of record—to institute the necessary inquiry whether the matters alleged to constitute the waiver have, in fact, occurred. To sustain the appellants’ objection and hold that we are without power to institute such inquiry is equivalent to saying that the supreme court of Colorado is without power to determine a question pertaining to its own jurisdiction.”

The stipulation above quoted being a matter of record, this case falls within the rule above announced.

2. The judgment against Stratton was upon the theory, and it is so conceded, that he was a joint tort-feasor with the Duceys, his liability being founded upon his joining with the Duceys in the conception and consummation of a scheme to defraud defendant in error out of two thousand dollars and seven thousand five hundred shares of the capital stock of the Portland Gold Mining Company.

That the release or discharge of one or more joint tort-feasors, executed in satisfaction of the tort, is a release of all, has been held by this court in *Bowman v. Davis*, 13 Colo. 297, 22 Pac. 507, and *Denver & R. G. R. R. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501. Both cases quote approvingly the doctrine announced in *Cooley on Torts*, second edition, page 160: “It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar as to all”: *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Seither v. Philadelphia Traction* ²²² *Co.*, 125 Pa. 397, 11 Am. St. Rep. 906, 17 Atl. 338, 4 L. R. A. 54; *Chapin v. Chicago etc. R. R. Co.*, 18 Ill. App.

47; *Brown v. City of Cambridge*, 3 Allen, 474; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Goss v. Ellison*, 136 Mass. 503; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135.

In *Turner v. Hitchcock*, 20 Iowa, 310, Mr. Justice Dillon, writing the opinion of the court, says: "It is also an undisputed principle of the common law that, as a general rule, the release of one joint wrongdoer releases all. The rule and the reason for it are thus stated in a work of high authority: 'If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done, yet if he releases to one of them, all are discharged, because his own deed shall be taken most strongly against himself.' Also (which seems to be the better reason), such release is a satisfaction in law which is equal to a satisfaction in fact: Bacon's Abridgment, tit. 'Release' B. . . . 'The reason of the rule [that the release of one is the release of all] seems,' says Bronson, J., with his accustomed clearness and force (*Bronson v. Fitzhugh*, 1 Hill, 185), 'to be that the release being taken most strongly against the releasor is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort-feasors, no foundation remains for an action against anyone. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done.' "

By the great weight of authority the doctrine is settled that the satisfaction of a judgment against one of the several joint tort-feasors bars an action against the others.

This doctrine is applicable to the case under consideration, unless, as defendant in error maintains, this doctrine does not apply where the release shows ²²³ upon its face that it was not intended to release all, and insists that the last paragraph of the stipulation above quoted brings it within the exception stated.

The authorities upon this subject are irreconcilable.

Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293, was an action by a passenger upon a street-car which came into collision with a railway train operated by the railway company, resulting in injuries to the plaintiff, for which damages were claimed against the railway company only. Plaintiff settled with the street railway company, executing the following receipt:

"For and in consideration of the sum of three hundred dollars (\$300), in hand paid, and a pass over the Grant Street Electric Railway for the period of one year, I, the undersigned, do hereby release and discharge the Grant Street Electric Railway Company from any and all damages done to me in my person or property in the late collision between a car of the Grant Street Electric Railway Company and a train of the Northern Pacific Railroad Company. This agreement is not to be taken or considered as a release of any damages which the undersigned may have against the Northern Pacific Railroad Company."

At page 433, the court said: "It is urged that the release in the case at bar amounts to no more than an acknowledgment of partial satisfaction of the entire demand, and that this is made clear by the reservation of a right to make further demand of appellant, which appears at the conclusion of the written instrument set out above; in other words, it is insisted that the parties to that agreement did not intend it to be a release of appellant. As we have seen, however, they did intend it to be a release of appellant's joint tortfeasor. ²²⁴ The following cases, however, not only support those already cited, but further hold that in an action to recover for a joint tort, if the plaintiff shall receive money in satisfaction of the wrong done him by one party, it is a satisfaction as to all, and they are thereby discharged of all liability to plaintiff, whether the parties to the release agreement intended it to so operate or not: See *Brown v. Kenchloe*, 3 Cold. 192; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Mitchell v. Allen*, 25 Hun, 543; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504. In the cases last cited there were reservations to the effect that, notwithstanding the release of one, others who were jointly liable should not be thereby released; but in each instance it was held that the release of one operated in law to release all. Referring to a release with such a reservation, the opinion in *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534, makes the following observation:

" 'It can make no difference that it was part of the agreement between the plaintiff's agent and Williams and Adkins that the giving and receiving the note mentioned in the pleas was not to be a satisfaction for the other trespassers. Each joint trespasser being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction

made by one for his liability operates as a satisfaction for the whole trespass, and a discharge of all concerned. Williams and Adkins could make no agreement impairing the legal rights of the defendants, nor cede to the plaintiff the privilege these defendants had of availing themselves of any matter forming a legal defense to this action. The accord and satisfaction mentioned in the third plea operate in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons ²²⁵ to deprive them, by any agreement of theirs, of the benefit of this legal discharge.' "

The Washington court then reviews the authorities contra the above doctrine, including a number of cases relied upon by defendant in error here, and concludes (page 437): "Other cases cited by respondent relate to contractual obligations, and we think the above a fair review of the authorities cited bearing directly upon the principle under discussion here. It will thus be seen that there is some conflict in authority, but we believe it is manifest from the foregoing that the decided weight of authority in this country is to the effect that such a release as is shown in this case operates to discharge all who participate in a joint tort. It is true it has been held, and doubtless correctly, that a mere agreement not to sue one is not a release of the others; but when an injured party makes an estimate of the amount of damages he is willing to receive from one, and accepts such sum with the agreement that it shall fully release and discharge the one making the payment, we think it is more than a mere agreement not to sue. It is a release of his cause of action in consideration of a satisfaction, and there is scarcely any dispute among the authorities that, where there is an absolute release of one, it operates to release all tort-feasors who participated in the same act."

The stipulation under consideration cannot be held to be a covenant not to sue, under any reasonable rules of construction of which we are advised, so as to bring it within the rules applicable to such documents.

The authorities cited by counsel for defendant in error have been examined with care. Many of them are clearly distinguishable from the case under consideration. Suffice it to say that we believe the ²²⁶ better doctrine, supported by the greater weight of authority and by reason, is that

stated in the Abb case (28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293).

3. As observed above, the statute relied upon (3 Mills' (Rev.) Stats., sec. 2528a) did not take effect until six days after the judgment was rendered.

It must be conceded that Stratton had a vested interest in the judgment, as it was rendered, and as such had a right to have the judgment satisfied out of the property of the Duceys before resort could be had to his estate for satisfaction.

To give to the statute the power and effect contended for by defendant in error would be contrary to section 11, article 2 of the Colorado constitution:

"That no *ex post facto* law, . . . or retrospective in its operation . . . shall be passed by the General Assembly."

Upon this point, in *Jones v. Stockgrowers' National Bank*, 17 Colo. App. 79, 67 Pac. 177, Judge Wilson, speaking for the court, said: "The first and chief aim and object of a court, in construing a statute, is to ascertain the intention of the legislature, and in every country where the supremacy of law is recognized, it is far more reasonable to suppose that this intention was to legislate for the future rather than the past. Every reasonable doubt, as to such intent, must be resolved against, rather than in favor of, the retroactive operation of the statute. The leading case upon this subject in this jurisdiction is *Denver etc. Ry. Co. v. Woodward*, 4 Colo. 162. In this Chief Justice Thatcher said: 'But when legislatures, even in the absence of a constitutional interdict, pass laws which might be so construed as to give them a retrospective effect, courts will not so interpret them, unless the intention of the law-making power is clearly declared. With caution and distrust courts give retrospective²²⁷ statutes effect even where the law-giver has constitutional power to enact them.' To the same effect is *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053, in which Judge Bissell discussed the subject and affirmed the same rule in an able and exhaustive opinion. In *United States v. Heth*, 3 Cranch, 399, 2 L. ed. 479, it was said, in the opinion of the court: 'Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' The rule is founded on the soundest principles of public policy and its reason is manifest. Every citizen is supposed

to know the law and to govern his conduct, both as to business affairs and otherwise, in accordance with its provisions. It would be a manifest injustice if, after rights had become vested according to existing laws, they could be taken away, in whole or in part, by subsequent legislation. And even in cases where the legislature is empowered to enact laws to some extent retroactive in effect, it would be equally unjust, by judicial construction of a doubtful statute, to take away pre-existing rights, even so far as the remedy only was concerned. Such a course would tend inevitably to bring about a state of uncertainty and instability, which would not only bring the law into disrepute, but work serious injury in many cases."

In *Perry v. City of Denver*, 27 Colo. 93, 59 Pac. 747, the present chief justice said: "In passing upon what is termed 'retrospective law,' various definitions have been given, dependent largely upon the particular facts presented in each case, but one generally accepted, which appears to fully cover the subject, in so far as the case at bar is concerned, is to the effect that a law is retrospective in its legal sense which takes away or impairs ²²⁸ vested rights, acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability in respect to transactions or considerations already past": See, also, *Evans v. City of Denver*, 26 Colo. 193, 57 Pac. 696; *Denver S. P. & P. Ry. Co. v. Woodward*, 4 Colo. 162.

We do not believe that it was the intention of the legislature that the statute under consideration should be retrospective in its effect.

To give it the construction contended for by defendant in error would violate the intention of the legislature in its enactment, bring it clearly within the definition laid down in *Perry v. Denver*, 27 Colo. 93, 59 Pac. 747, and within the inhibition of section 11, article 2 of the constitution, *supra*.

Our conclusions are, that the statute cannot be invoked in this case; that the judgment has been fully paid, performed and satisfied as to all the plaintiffs in error; that the writ of error should be dismissed, and that the judgment should be, and hereby is, declared fully paid and discharged, and it is so ordered.

Chief Justice Gabbert and Mr. Justice Gunter concurring.

The Release of One Joint Tort-feasor as the release of all is discussed in the notes to Louisville etc. Mail Co. v. Barnes, 111 Am. St. Rep. 281; Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 872. The better rule is that a release of one joint tort-feasor, upon his making part satisfaction only does not discharge the others, except pro tanto: Louisville etc. Mail Co. v. Barnes, 117 Ky. 860, 111 Am. St. Rep. 273; and that an instrument which releases one but expressly reserves the right to pursue the others does not discharge the latter: Gilbert v. Finch, 173 N. Y. 455, 93 Am. St. Rep. 623.

CITY OF DENVER v. DAVIS.

[37. Colo. 370, 86 Pac. 1027.]

MUNICIPAL CORPORATIONS—Duties and Liability.—In the discharge of its functions a municipality is called upon to perform duties of two classes, the one political and governmental, and the other private and corporate, and its liability or nonliability for damages depends upon the character of the duty performed, rather than upon the department, officer or agent of the corporation by whom the duty is performed. (p. 295.)

MUNICIPAL CORPORATIONS—Liability for Acts of Officers.—A municipality is not liable for the acts of its officers or agents of the departments of health, police, or fire, while in the performance of public governmental functions, and duties connected with, and appertaining to, such departments. (p. 296.)

MUNICIPAL CORPORATIONS—Dumping Grounds maintained by a city for waste material collected by the city and private teams from the streets, alleys, and other public and private places in the city are for the convenience and benefit of the inhabitants of the city, and an adjunct to the street cleaning department of the city, their maintenance not being the discharge of any public duty imposed upon the city by the state, but the exercise of a municipal function by the city, in its private and corporate capacity. (p. 297.)

MUNICIPAL CORPORATIONS—Neglect in Care of Streets—Liability.—The superintendence and care of the streets and alleys of a city, and all that directly pertain thereto, are peculiarly in the class of municipal duties, for the neglect of which the city, in its corporate capacity, is liable. (p. 298.)

MUNICIPAL CORPORATIONS—Dumping Grounds—Negligence—Liability.—The maintenance of a dumping ground for waste material collected by the city from its streets and alleys and private premises in the city, is merely the exercise of a municipal function by the city in its private and corporate capacity for the benefit and convenience of itself and its inhabitants, and if such dumping ground is in the charge of, and under the supervision of, the city health commissioner and his agents, the city is liable for their negligence in allowing a fire to spread therefrom and destroy the property in the vicinity. (pp. 298, 299.)

H. M. Orahood and N. B. Bachtell, for the appellant.

W. Young, G. F. Dunkler and O. E. Jackson, for the appellee.

371 MAXWELL, J. This was an action by Mary E. Davis against the city of Denver to recover damages resulting from the destruction of her property by fire alleged to have been caused by the negligence and carelessness of the officers and agents of the city.

Plaintiff was the owner of personal property in a building adjacent to the city dumping ground, which has been established by the health commissioner of the city pursuant to the requirements of a municipal ordinance. The supervision and control of the dumping ground was in the health commissioner, who discharged this duty by officers appointed by him and paid by the city. The combustible material deposited on the dump had been burning several weeks when, on May 2, 1901, the fire, driven by a heavy wind, communicated to the building in which plaintiff's property was stored, and the same was destroyed.

A trial to a jury resulted in a verdict and judgment for plaintiff.

The assignment of errors raises but one question.

372 The city requested the court to instruct the jury in substance that the disposition of the garbage of the city was not a corporate duty performed by the city for its local or pecuniary benefit, but was a public or governmental duty, placed upon the city by the legislature of the state, to be performed under the supervision of the health commissioner, who is a public official, and not in any sense a corporate official; therefore, if the jury found, from the evidence, that the damage to the plaintiff was caused by the location of the dump being improperly and carelessly maintained by the health commissioner of the city at such place, then the plaintiff cannot recover against the city, because the negligence or nonperformance of duty of a public officer, such as the health commissioner, cannot be charged against the city of Denver, as the city is but the agent of the state in such matters, and can be held to no greater liability than could the state itself.

The requested instruction was refused, and error is assigned thereon.

The instruction is subject to the objection that it was predicated upon the ground that the disposition of garbage of the city is a political and governmental duty, whereas the evidence failed to show that garbage, using that term in its strict sense, was deposited upon the dumping ground. However, we prefer to dispose of the case upon the principles involved, rather than upon a technical objection to the instruction.

In the discharge of its functions, a municipality is called upon to perform duties of two classes: the one political and governmental in its character, and the other private and corporate. The distinction between the two is thus stated by Judge Thompson, in *Veraguth v. Denver*, 19 Colo. App. 473, 76 Pac. 539: ³⁷³ "One class of its powers is of a public and general character, to be exercised in virtue of certain attributes of sovereignty delegated to it for the welfare and protection of its inhabitants; the other relates only to special or private corporate purposes, for the accomplishment of which it acts, not through its public officers as such, but through agents or servants employed by it. In the former case its functions are political and governmental, and no liability attaches to it, either for nonuser or misuser of power; while in the latter it stands upon the same footing with a private corporation, and will be held to the same responsibility with a private corporation for injuries resulting from its negligence: *Dillon on Municipal Corporations*, sec. 974; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405, 30 L. R. A. 660; *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300."

The same doctrine is recognized in *McAuliffe v. City of Victor*, 15 Colo. App. 337, 62 Pac. 231.

In *Maximillian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468, Judge Folger thus states the doctrine: "There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the lat-

ter is public, and is used for public purposes. The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is ³⁷⁴ liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser, by the public agents."

The rule which determines the liability or nonliability of a municipality in cases of this nature is the character of the duty performed, rather than the department, officer or agent of the corporation by whom the duty is performed. The authorities all hold that a municipality is not liable for the acts of officers or agents of the departments of health, police or fire, while in the performance of public governmental functions and duties connected with and appertaining to such departments, not upon the theory that the officer is a member of such department, but because the duty performed by him is a public governmental duty, imposed upon the municipality by the state. It is, therefore, the character of the duty, rather than the officer by whom it is performed, which determines the liability or nonliability of the municipality. Therefore, it may be conceded that the health commissioner of Denver was a public officer, made such by the statutes of the state, charged with the performance of certain governmental duties as contended by appellant; nevertheless it does not follow that the municipality is relieved from liability for the negligence or carelessness of such officer in the performance of duties imposed upon him by the municipality which are not of a public governmental character.

Suppose the city had imposed upon the chief of police the duty of superintending the street-cleaning department; it could not be successfully maintained, ³⁷⁵ under the authorities, that the acts of such officer, while in the discharge of his duties as superintendent of the street-cleaning department, might not entail liability upon the city for his carelessness or negligence in the discharge of such duties.

It is therefore necessary to determine to which class of duties, as above defined, the duties imposed upon the health commissioner herein involved belong.

The evidence disclosed that there were deposited upon the dumping ground, established by the health commissioner, ashes, paper, straw, manure, rags, boxes, scrap metal and like materials, collected by the city and private teams from the streets, alleys and other public and private places and premises in the city.

There was no evidence to show that garbage of the city, using that term in its restricted sense, was deposited at this place.

As before stated, the supervision and control of the dumping ground was delegated to the health commissioner, who, through his officers and employes, had control of the deposit of waste and materials brought there, and were also charged with the prevention of combustion and spreading of fire. The greater portion of the material deposited upon the dumping ground was so deposited by the city teams connected with the street-cleaning department.

We think that the evidence in this case clearly establishes the fact that the establishment and maintenance of this dumping ground was for the convenience and benefit of the inhabitants of the city, and as an adjunct to the street-cleaning department of the city, and was not in the discharge of any public duty imposed upon the city by the state; that it was local and special in its character; that the collection and deposit of such material as the evidence ³⁷⁶ shows was deposited upon the dump was the exercise of a municipal function by the city in its private and corporate capacity.

The overwhelming weight of authority is to the effect that the superintendence and care of the streets and alleys of a city, and all that directly pertains thereto, are peculiarly in the class of municipal duties, for the neglect of which the city, in its corporate character, is liable.

In *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705, this court held that an implied duty rested upon the city to keep in repair the public thoroughfares within its limits, for the neglect of which an action would lie against the city.

In *Denver v. Peterson*, 5 Colo. App. 41, 36 Pac. 1111, the city was held liable for carelessness in the operation of a steam roller in charge of the board of public works.

In *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729, the city was held liable for negligence in the construction of a public sewer, and it is manifest that the disposition of the sewage of a city has a more direct influence upon the health of the inhabitants of a city than the disposal of the waste found upon its streets and alleys.

In *McAuliffe v. City of Victor*, 15 Colo. App. 337, 62 Pac. 231, it is said: "Courts have gone a long way in holding cities liable for the negligent acts of their agents, and they are always holden wherever the acts which are done or permitted to be done are acts for the benefit of the individuals who are inhabitants of the municipality. It is on this general principle that a city is held liable for the care of its streets and sidewalks, for negligence or carelessness in the construction of its sewers and drains."

Appellee in this case was a tenant of one Porter at the time of the fire. Porter's building was destroyed by the same fire which destroyed appellee's ³⁷⁷ property. In the circuit court of the United States for Colorado, Porter sued the city to recover damages sustained. Judgment went against the city. The case went to the circuit court of appeals on error, where the judgment was affirmed. An examination of the printed transcript of the record and briefs filed in the latter case discloses that the issues, evidence and legal propositions involved were substantially the same as in the case before us. The opinion of the court, written by Judge Hook, is an instructive, and exhaustive examination and discussion of the principles and authorities there and here involved. The case is reported in 126 Fed. 288, 61 C. C. A. 168. At page 174 it is said: "We are of the opinion that in the case before us the removal of the waste and refuse from the alleys of the city in the city carts, the deposit thereof upon the dumping grounds near Porter's premises, and the supervision of such work and of the dump itself, were of local or municipal concern, and that the officers and employés of the health department of the city, in the discharge of their duties in connection with such work and supervision, were acting as the representatives of the city, for whose negligent acts or omissions it would be liable. The fact that part of the refuse wasted upon the dump under the direction of the officers stationed there was hauled in private vehicles from

private premises leads to no different conclusion. The dump was under the exclusive control of those officers, and they represented the local or corporate interests of the city rather than the state in its sovereign capacity."

And again at page 173: "But in almost all affairs of purely local concern some indirect relation may be traced to a matter of health, safety or other subject of governmental cognizance. The test is not that of casual or incidental ³⁷⁸ connection. If the duty in question is substantially one of a local or corporate nature, the city cannot escape responsibility for its careful performance because it may in some general way also relate to a function of government."

The record before us warrants the conclusion that in this case the city was acting in its private and corporate capacity through its health commissioner, for the convenience and benefit of its inhabitants, and not as an agent of the state in the discharge of any governmental duty imposed upon it.

The rule here announced is not opposed to the rule announced by our court of appeals in *McAuliffe v. Victor*, 15 Colo. App. 337, 62 Pac. 231, and *Varaguth v. Denver*, 19 Colo. App. 473, 76 Pac. 539. In the former case the court held that the city was not liable for the negligence of a police officer in the discharge of a purely governmental duty, and in the latter case, that the city was not liable for failure to enforce a municipal ordinance.

It follows that the health commissioner and his officers, being negligent and careless in the performance of a local and municipal duty, the city is liable for damage occasioned by such negligence and carelessness.

The court committed no error in refusing to give the requested instruction, and the judgment must be affirmed.

Chief Justice Gabbert and Mr. Justice Gunter concurring.

The Liability of Cities for the Acts of Their Agents and officers is the subject of a note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376. The general rule is that a city is not liable for acts done in pursuance of its governmental functions, but only for those pertaining to its private affairs: *Esberg Cigar Co. v. Portland*, 34 Or. 282, 75 Am. St. Rep. 651; *Rhobidas v. Concord*, 70 N. H. 90, 85 Am. St. Rep. 604, and cases cited in the cross-reference note thereto. If a city, in the exercise of its police power, employs a person to cut weeds in an alley, it is not answerable for his negligence in operating a mower, whereby a child is injured: *McFadden v. Jewel*, 119 Iowa, 321, 97 Am.

St. Rep. 321; and a city is not liable for the loss of private property caused by sparks from a steam roller used by its officers in repairing streets: *Alberts v. Muskegon*, 146 Mich. 210, 117 Am. St. Rep. 633. If by a sewer or drain a city conducts water upon the land of a private owner, doing damage thereto and causing sickness and death to his family, it has been held that he may recover for the injury to the property only: *Williams v. Greenville*, 130 N. C. 93, 89 Am. St. Rep. 860.

CASES
IN THE
SUPREME COURT
OF
DELAWARE.

QUEEN ANNE'S RAILROAD COMPANY v. REED.

[5 Penne. (Del.) 226, 59 Atl. 860.]

APPEAL—Motion for Nonsuit—Review.—The action of the trial court upon a motion for a nonsuit is not reviewable on appeal. (p. 303.)

NEGLIGENCE—Presumption of, from Accident.—The mere fact of an accident by which an injury is sustained, if not within the control of the defendant, does not, of itself, raise a presumption of negligence. (p. 305.)

NEGLIGENCE—Burden of Proof.—Plaintiff must both allege and prove negligence on the part of the defendant to be entitled to a recovery, as the burden of proving negligence rests upon plaintiff. (p. 305.)

NEGLIGENCE is Want of Ordinary or Reasonable Care in respect to that which it is the duty of the party to do or to leave undone. (p. 306.)

NEGLIGENCE—How Determined.—It is for the court to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred. (p. 306.)

NEGLIGENCE—Failure to Prove—Nonsuit.—If plaintiff fails to produce any evidence of negligence on the part of defendant, or if no fair inference of negligence can be drawn from the evidence favorable to plaintiff, the court must nonsuit the plaintiff or direct a verdict for the defendant. (p. 306.)

NEGLIGENCE—When Question of Fact.—If there is any evidence of negligence upon which the jury can properly find a verdict, or if the conclusion to be drawn therefrom is debatable, or rests in doubt, though the facts are undisputed, or if the evidence is conflicting in regard to any material fact, the question of negligence is one of fact for the determination of the jury. (pp. 306, 307.)

NEGLIGENCE, CONTRIBUTORY.—Burden of Proof to establish contributory negligence whenever it is relied upon as a defense rests upon the defendant, but proof of such negligence may arise out of the testimony of the plaintiff in the first instance. (p. 307.)

NEGLIGENCE, CONTRIBUTORY—When Question of Fact.—The court will not decide a certain act to constitute contributory negligence as a question of law, although the weight of evidence may seem to be on one side or the other, if the testimony is conflicting, or

if the conclusion to be drawn therefrom is doubtful or uncertain. Under such circumstances the determination of the question clearly falls within the province of the jury. (p. 307.)

NEGLIGENCE, CONTRIBUTORY—When Question of Law.—If the evidence clearly shows contributory negligence proximately entering into, and clearly contributing to, the accident, at the time of its occurrence, the court must so find, as a matter of law. (p. 307.)

RAILROADS—Crossings—Place of Danger—Notice of.—The law regards a railroad crossing as a place of danger, and its presence is notice to a person approaching or attempting to cross it of the danger of colliding with a passing train. (p. 308.)

RAILROADS—Crossings—Duty to Stop, Look, and Listen—Contributory Negligence.—A person approaching a railway crossing is required to stop, look and listen for an approaching train before venturing to cross, and if he fails to exercise such ordinary care, whatever danger he could thereby have discovered and avoided he incurs the peril of if he proceeds, and for an injury arising under such fault, he is without a remedy, by reason of his contributory negligence. (p. 308.)

RAILROADS—Crossings—Obstructed View of—Duty to Stop, Look and Listen.—Although the view of the railroad is obstructed at a crossing, that fact does not relieve the traveler from the duty to look and listen for an approaching train, whether special or regular. (p. 308.)

RAILROADS—Crossings.—Rights of Railways at highway crossings are superior to those of a traveler upon the highway. (p. 308.)

RAILROADS—Crossings—Care to be Used.—The superior right of a railway company at a highway crossing does not relieve it from reasonable and ordinary caution to prevent accidents, and the degree of care necessary may be affected by obstructions which prevent the track from being seen as the train approaches. (p. 309.)

RAILROADS—Crossings—Care to be Used.—Both the traveler and the railroad company are charged with the same degree of care at a highway crossing, the one to avoid being injured, and the other to avoid inflicting injury, and the care to be exercised by each must be commensurate with the risk and danger involved. (p. 309.)

RAILROADS—Negligence at Crossings—Presumption.—A person attempting to cross a railroad track at a highway crossing, and being injured, is presumed to have exercised reasonable and ordinary care in doing so, and if he was negligent, in fact, it must be shown by positive evidence, or from the circumstances attending the accident. (p. 309.)

EVIDENCE—Credibility of Witnesses.—The testimony of witnesses, without qualification, that they heard a certain train whistle at a highway crossing is of much more weight than those who merely say that they did not hear such whistle. (pp. 309, 310.)

EVIDENCE—Credibility of Witness.—A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight. (p. 310.)

NEGLIGENCE, CONTRIBUTORY—Want of Care at Railroad Crossing.—A total absence of reasonable care and caution on the part of a traveler in approaching a railway crossing, in making no effort to ascertain whether a train is approaching, or to avoid the danger imminent at the time he attempts to make the crossing, is contributory negligence, which bars any recovery for an injury received. (p. 312.)

C. W. Cullen and A. H. Taylor, for the plaintiff in error.

R. C. White, for the defendant in error.

²²⁸ BOYCE, J. This action was brought in the superior court for Sussex county by Mary E. Reed, widow of John W. Reed, deceased, the defendant in error, against the Queen Anne's Railroad Company, the plaintiff in error, for the recovery of damages for death of the said John W. Reed, alleged to have been occasioned by the negligence of the defendant company. The real contention of the plaintiff raised under the pleadings and the evidence being that the whistle was not sounded and the bell was not rung, if at all, at such a time and place as to give due and proper notice of the approach of the locomotive and cars attached, and that the said locomotive and cars were moving at a dangerous rate of speed immediately before and at the time they ²²⁹ approached and passed over the crossing at which the accident occurred. There was neither allegation nor attempt to show that the servants of the company either saw, or, in the exercise of reasonable care, might have seen, the deceased in time to have avoided the accident; nor were the servants charged with neglect of duty from the time the peril of the deceased was seen, or might have been seen, up to the time of the accident.

When the plaintiff had rested her case the defendant moved for a nonsuit, on the ground that the testimony produced by her showed either (1) that the injury complained of was the result of an inevitable accident, or (2) that the deceased was guilty of contributory negligence. The court, in disposing of the motion, said: "Under the testimony, this is a very close case; but as it stands we must decline to grant a nonsuit, and will let you go to the jury." It may be said here that the refusal to grant the nonsuit is not before this court, because under our decisions the action of the court upon a motion for a nonsuit is not reviewable. At the close of the case the defendant presented several prayers for instructions, the last of which was "That the court instruct the jury to render a verdict for the defendant." The case was, however, submitted to the jury under the charge of the court. There are several assignments of error, but at the hearing in this court counsel for the defendant confined themselves to the last—"For that the court erred in refusing to charge the jury to render a verdict for the defendant as requested"—

it being contended that the evidence introduced by the plaintiff, and not affected by that offered by the defendant, otherwise than to strengthen it, clearly showed that the defendant was not negligent at the time of the accident, but, on the contrary, that it was the negligence of the deceased which occasioned the collision and his death at the crossing.

A very short time before the accident, which occurred between the hours of 4 and 5 o'clock in the afternoon, on the — day of March, A. D. 1901, the deceased, being in a fall-top carriage, drawn by a horse, was seen driving along Federal street, toward his farm, the place of his residence, some distance, in a ²³⁰ southerly direction, from the town of Milton. In his attempt to pass over what is known as Federal street crossing, which is formed by the intersection of said street or highway and the tracks of the defendant company, an engine with a tender and a passenger coach attached collided with the carriage, demolishing it, and he was, it appears, instantly killed. His body was seen very soon thereafter lying on the north side of the track, about one hundred and fifty or two hundred feet westerly of the crossing. The horse escaped with a slight injury. The track of the defendant company is laid along the southern edge of the town, in a sparsely settled part thereof, and extends in an easterly and westerly direction. The train was a special which had come from Lewes, on its way westward to Queenstown, and was running, when near the station, which is seven hundred and fifty-five feet east from the place of the accident, at a rate of speed varying, under the evidence, from twenty-five to forty-five miles an hour. The station was located adjacent to the Chestnut street crossing, and at a short distance east therefrom there stood a small tool-house. The freight-house was located west of the station, and the western end thereof was five hundred and thirty-eight feet from the Federal street crossing. A warehouse stood a very short distance west of the freight-house. It seems that all these buildings were on the north side of the track, between the latter and the town. On the east of Federal street crossing, a distance of two thousand feet therefrom, and twelve hundred and forty-eight feet from the station, there was a branch, crossed by what several of the witnesses called the trestle work, it being a bridge, which was hidden from both Chestnut and Federal streets by a woods, the western edge of which was five hundred and seventy-five feet from the Chestnut street crossing, and thirteen hundred

and thirty feet from the Federal street crossing. At the time of the accident several of the witnesses, mostly for the plaintiff, were loading cars with hickory butts on a sidetrack or switch some fifty or seventy-five yards east of the station. Blizzard and his wife, who, as well as the other persons hereinafter named in this statement, being witnesses for the plaintiff, were at ²³¹ their home twenty or thirty yards south of the Federal street crossing; Van was in his home, located on the west side of Federal street, about two hundred feet from the crossing; Simpler was at his home, known as the Oliver house, on the west side of Federal street, about two hundred and sixty-five feet from the crossing; William H. Bailey was likewise at his home, about one thousand feet west and abreast of the crossing and three hundred feet from the track; and King was on Chestnut street in a wagon going toward the station, about a hundred and fifty or two hundred yards therefrom. From Van's house, on the east side of the street and nearly down to the railroad, there was a row of trees, mostly cedar, eight or nine in all, varying from six to twenty-four feet apart, with underbushes and briars, six to eight feet high, growing between them for a distance of about forty feet from the railroad toward the house. The railroad, as it approached the crossing, was not on a level with the surrounding country, but ran through a cut which began above the freight-house, and at the crossing the top of the rail was three feet below the level. Federal street ran along the western side of a hill or elevation. There was an ascent from the crossing on Federal street toward the town for a distance of two hundred and fifty feet when a level was reached. The highest point in the elevation on the eastern side of said street, within twenty or thirty feet of the center of the railroad, at the crossing, was about five feet above the top of the rail. At the center of said street, one hundred and twenty-five feet distant from the crossing, the highest point in the elevation, looking toward the station, was said to be about six feet.

The mere fact of an accident by which an injury is sustained, if not within the control of the defendant, does not, in itself, raise a presumption of negligence: *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167. And it is necessary that the plaintiff should have both alleged and proved negligence, on the part of the defendant, to entitle her to a

recovery; for the burden of proving negligence rests upon the plaintiff.

²³² Negligence has been defined to be the want of ordinary or reasonable care in the respect of that which it is the duty of the party to do or leave undone. To reach a determination of what negligence is, Judge Cooley in his work on Torts says: "We are not to look solely at a man's acts or his failure to act; the term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. That the degree is not the same in all cases; it may vary according to the danger involved in the want of vigilance." He further adds: "Negligence in a legal sense is no more nor less than this: The failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

Whether there was any negligence, at the time of the accident, and whose, must be determined from the evidence under all the facts and circumstances of the case. It is for the court to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred: *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193; *Creswell v. Wilmington etc. R. R. Co.*, 2 Penne. (Del.) 210, 43 Atl. 629.

If the plaintiff fails to produce any evidence of negligence on the part of the defendant, or if, as it has been said, no fair inference of negligence can be drawn from the evidence favorable to the plaintiff, assuming that such evidence is true, it becomes the duty of the court to nonsuit the plaintiff or to direct a verdict for the defendant: *Commrs. of Marion Co. v. Clark*, 94 U. S. 278, 24 L. ed. 59; *Randall v. Baltimore etc. R. R.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, 27 L. ed. 1003; *Wheatley v. Philadelphia etc. R. R.*, 1 Marv. (Del.) 305, 30 Atl. 660; *Creswell v. Wilmington etc. R. R. Co.*, 2 Penne. (Del.) 210, 43 Atl. 629; *Tully v. Philadelphia R. R. Co.*, 2 Penne. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019.

²³³ If there is any evidence of negligence upon which the jury can properly find a verdict, or if the conclusion to be drawn therefrom is debatable or rests in doubt, though the facts are undisputed, or if the evidence is conflicting in re-

gard to any material fact, it becomes a question of fact for the determination of the jury: *Vinton v. Schwab*, 32 Vt. 612; *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531; *Delaware etc. R. R. Co. v. Shelton*, 55 N. J. L. 342, 26 Atl. 937; *Schofield v. Chicago etc. R. R. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125, 29 L. ed. 224.

Although the plaintiff may show that the injury complained of was in consequence of the negligence of the defendant, yet it does not conclusively determine that the injury was legally attributable to such negligence, because it may equally appear that the injury was due to the fault or negligence of the person injured. This brings us to the consideration of contributory negligence, the burden of establishing which, whenever it is relied upon in defense of the action, rests upon the defendant; proof of such negligence may, however, arise out of the testimony of the plaintiff in the first instance.

It is quite impossible to lay down any definite rule by which to determine whether the question of contributory negligence is to be found, under the evidence, as a conclusion of law, or should be submitted to the jury as a question of fact. The determination of the question must necessarily be controlled by the facts and circumstances of the particular case. And the court will not decide it as one of law, although the weight of the evidence may seem to be on one side or the other, if the testimony be conflicting, or if the conclusion to be drawn therefrom is doubtful and uncertain. In such a case the court will not, and should not, attempt to weigh and determine the effect of the evidence involved in the issue of fact. For under such circumstances the question clearly falls within the province of the jury: *Pennsylvania R. R. Co. v. Middletown*, 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616; *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531; *Delaware etc. R. R. Co. v. Shelton*, 55 N. J. L. 342, 26 Atl. 937.

²³⁴ If, however, it clearly appears from the evidence that there was contributory negligence, proximately entering into and contributing to the accident, at the time of its occurrence, it is the duty of the court to so find, as a matter of law.

In short, ordinarily in actions for personal injuries, the cases are exceptional when the court is warranted in ordering a nonsuit, or directing a verdict for the defendant; and such cases are confined to those where it is clearly manifest as a conclusion of fact, or by necessary exclusive inference, that those acts which the law regards as negligent have not

been shown, or to those in which contributory negligence has been shown: *Palys v. Erie Ry. Co.*, 30 N. J. Eq. 604; *Pennsylvania R. R. Co. v. Richter*, 42 N. J. L. 180.

The law regards a railroad crossing as a place of danger. The very presence of such a crossing is notice to the person approaching or attempting to cross it of the danger of colliding with a passing engine or train. And because of the danger, there is imposed upon such person the duty of reasonable care and caution, and the reasonable and ordinary use and exercise of his senses of sight and hearing for his own and others' safety and protection; and he is required, at least, to look and listen for an approaching engine or train before venturing to cross the track. And if, as it has been said, he fails to exercise such ordinary care, whatever danger he could thereby have discovered and avoided he incurs the peril thereof if he proceeds, and for an injury arising under such fault he is left without remedy: *Pennsylvania R. R. Co. v. Middleton*, 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616.

In *Cooley on Torts*, at page 680, it is said: "One about to cross a railway track by the public highway, where the liability to collision is great, will be held precluded, by his contributory negligence, from a recovery for an injury, if he drives upon the track without looking for an approaching train, even though the railway company has neglected to sound the alarm which the statute requires of it at such places": ²³⁵ See, also, *Salter v. Utica & B. R. R. Co.*, 75 N. Y. 273; *Lake Shore & M. R. R. Co. v. Miller*, 25 Mich. 274; *Allyn v. Boston & A. R. R. Co.*, 105 Mass. 77; *Cincinnati, H. & I. R. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531.

Although the view of the road is obstructed, that fact does not relieve the traveler from the obligation to look and listen for an approaching train. And the observance of this legal duty applies as well to a special as a regular train: *Schofield v. Chicago etc. R. R. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125, 29 L. ed. 224. The very fact of the existence of such obstruction and particularly when it is known to the traveler, imposes additional care and caution upon him on approaching the track: *Beach on Contributory Negligence*, 65.

The right of a railway company at a highway crossing is superior to that of a traveler upon the highway. Rapid transit for the convenience of the traveling public and for

the quick transportation of freight and produce necessarily make this so; yet this superior right does not relieve the company from reasonable and ordinary caution to prevent accidents at such crossings. And this degree of care may be affected by obstructions which prevent the track from being seen as a train approaches. Both the traveler and the company are charged with the same degree of care—the one to avoid being injured, and the other to avoid inflicting injury: 8 Am. & Eng. Ency. of Law, 387.

There is not only the danger incident to the passing and repassing of regular trains at highway crossings, but, in the management and business of railroads, trains may be delayed and special trains are liable to be sent out at any moment, and, therefore, the danger to be avoided at such crossings calls for prudent watchfulness and caution on the part of both the company and the traveler; for the want of care by either would be equally liable to result in an injury. And the care of each must be commensurate with the risk and danger involved. And when it is known to the traveler and servants of the company that a crossing is very dangerous by reason of its surroundings, it is incumbent upon both parties to exercise additional care and caution.

²³⁶ There is a presumption, quite generally recognized, that, in the absence of direct testimony or rebutting circumstances, a person, in attempting to cross a railroad track at a highway crossing, and being injured, exercised reasonable and ordinary care in doing so. If negligence, in fact, existed on the part of the person injured, it must be shown by positive evidence, or from the attending circumstances of the accident: *Pennsylvania R. R. Co. v. Middleton*, 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616.

After a careful examination of the evidence, it conclusively appears that the defendant company gave notice by bell and whistle of its approach to the crossing at which the accident occurred; while, it is true, several of the plaintiff's witnesses were near enough to have heard the whistle, if blown for the crossing, at or near, the said branch, east of the station, yet they did not hear the whistle, or if they did, to use their language, they "did not pay any attention to it," or "did not take any account of it."

Those witnesses, however, failed to testify affirmatively and unqualifiedly that no such whistle was sounded. On the other hand, a number of the plaintiff's witnesses testified without

qualification that they heard the whistle at that point. The testimony of the latter witnesses is, of course, of much more weight than that of those who merely say they did not hear the whistle, which might be reasonably attributable to want of attention at the time; such negative testimony is usually of very little value.

Upon this point it was said in the case of *Menard v. Boston etc. R. R.*, 150 Mass. 386, 23 N. E. 214: "Ordinarily all that a witness can say, in such a case, when called to prove that a bell was rung, is that he did not hear it. Such a statement, with no accompanying facts, is merely negative, and of no value as evidence. But attending circumstances may be shown which make the statement strong affirmative evidence. It may appear that all the attention of which the witness was capable was concentrated on the effort to ascertain whether the bell was rung, and his failure to hear it could only have been because it made no sound. A witness may be in any ²³⁷ conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight."

The speed of the train was variously estimated from twenty-five to forty-five miles an hour. The estimate as to the rate of speed of a passing train by persons standing near the track at the time, having no experience or training in that respect, is usually very inaccurate and untrustworthy. It does not appear, however, from the evidence that the train was moving at a greater rate of speed than is usual in these days of rapid transit, where there is no restriction by statute or ordinance, and where no special dangers are to be apprehended.

It may be debatable whether the evidence, considered in its entirety, discloses any negligence on the part of the defendant company; and yet it is not altogether manifest that there was such an entire absence of negligence as to have made it the duty of the court to take the case from the consideration of the jury on that ground. Whether there was or was not any negligence on the part of the defendant company, it is manifest from the evidence that there was nothing in the conduct of the defendant company which in any way relieved the deceased from the exercise of reasonable and ordinary care in approaching the crossing, or which in any manner affected him in the control of his actions at or immediately before the fatal accident. It appeared from the uncontradicted testimony that the Federal street crossing was below the sur-

rounding country; that, in approaching the crossing, there was an elevation on the east side of Federal street from three to six feet, and likewise on the same side of the street there was a growth of trees, bushes, and briars, hereinbefore more minutely set forth, which materially obstructed the view of the railroad in the direction from which the train was approaching. It further appears that the decedent resided in the neighborhood, and frequently traveled along the said road or street, and over the crossing, and he was therefore acquainted with the surroundings. Under these circumstances it was obligatory upon him to use a higher degree of care and caution than would have been necessary in traveling upon a highway approaching a railroad where both were on a level with the ²³⁸ surrounding country, and where the view to an approaching train was clear and unobstructed. While, as it has already been said, in the absence of evidence to the contrary, the usual presumption is that one approaching a railroad has exercised due care and caution, in this case the court is not left to such a presumption alone, in determining the question of the diligence or negligence of the deceased, as we have the uncontradicted testimony of eye-witnesses as to his conduct immediately before and at the time of the accident. Van, a witness for the plaintiff, who lived at the time, as we have already shown, within two hundred feet of the crossing, saw the deceased pass in front of his window as he was approaching the crossing immediately before the happening of the accident. This witness says: "The decedent was going very slowly when he passed my house—just about jogging along"—which we understand to mean a slow trot. Witness heard the train blow immediately after the decedent had passed his house. The blow was for the station when he first heard her blow, which he heard very plainly. He afterward heard the whistle blow once or twice very sharp. He went out to see whether the man intended to get across or not before the train had got there. Mr. Reed was somewhere near halfway, after he came out on hearing the sharp blows, and was in his sight clear until the engine struck him. The horse seemed to be in a dead-level run. He did not see him make any stop at all—kept right on running. He jumped the track in the same way when his carriage was struck by the engine. Did not see him look to either side. Witness was asked: "Did you see him look, or trying to listen, when you saw him out of your window? A. No, sir; his head was

down. Did not seem to be taking any notice at all—sitting there.” This witness was the only person who was near and saw the deceased at and shortly before the accident, but his testimony in respect of the speed at which he was going is confirmed by two witnesses who were at the said railroad switch, east of the station. Elias Baily, a witness for the plaintiff, said: “I am like Mr. Carey. We happened to spy the top of his carriage going along the road. Q. How long did you continue to look at it? A. Not ²³⁹ very long, because the station cut it out of our sight. Q. Was the horse trotting or running? A. I could not say that. It was going along a good gait—a good ordinary gait.” Collins, a witness for the defendant, said: “I saw the carriage. I did not see the horse. I just got the glimpse of the carriage, and some one said there was a horse running on the other street. I jumped up on the log and looked across, and got a glimpse of the carriage. It was somewhere about Van’s house, I think, or somewhere in that direction. It was John W. Reed’s horse and carriage. I could not tell how fast the carriage was going along. They said it was running. I don’t just remember who it was. Some of them called my attention. They said, ‘There goes a horse running.’ The horse had got too far south, and behind the hill and those bushes. I thought he (Reed) was running a pretty dangerous risk along there, the way he was going with cars coming there.”

This testimony as to the conduct of the deceased is wholly without contradiction. The reasonable explanation of the increase of speed when the deceased was within one hundred feet of the railroad crossing is that he then became conscious of the fact that a train was approaching, and that he attempted thereby to clear the crossing before the train reached that point. If this was so, it was a clear case of negligence. He might have stopped or turned aside; but if, instead of doing so, he attempted a race with a locomotive, he did so at his own risk, and the defendant company is not responsible for the consequences of such conduct. Whether the speed at which he is proved to have approached the crossing did or did not indicate an intention to cross ahead of the train, it certainly shows a lack of that care and caution which were obligatory upon him under the circumstances at that time. Indeed, it seems quite inevitable from the evidence that there was a total absence of reasonable care and caution on the part of the deceased in approaching the crossing, in that he made

no effort whatever to ascertain whether a train was approaching, or to avoid the danger imminent at the time he attempted to make the crossing.

²⁴⁰ We are therefore clearly and unanimously of the opinion that even if the defendant company was guilty of any negligence, which, for the purposes of this case, it is not necessary for us to determine, the record unmistakably discloses that the deceased was himself guilty of such contributory negligence as defeats the right to recover in this action.

The judgment of the court below is reversed.

A Person about to Cross a Railroad track is ordinarily bound to stop, look, and listen for approaching trains: Scott v. St. Louis etc. Ry. Co., 79 Ark. 137, 116 Am. St. Rep. 67; Butler v. Rockland etc. Ry. Co., 99 Me. 149, 105 Am. St. Rep. 267, and cases cited in the cross-reference note thereto; Koch v. Southern Cal. Ry. Co., 148 Cal. 677, 113 Am. St. Rep. 332. As to the presumption of due care, in this respect, on the part of travelers, see the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 125. The presumption of negligence arising from an accident is the subject of a note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

WALKER v. STATE.

[127 Ga. 48, 56 S. E. 113.]

FORGERY—Sufficient Uttering to Constitute.—An allegation of uttering and publishing a forged instrument is proved by evidence that the prisoner offered to pass such instrument to another declaring or asserting, directly or indirectly, by words or actions, that it was good, although such offer was not accepted, nor the instrument exhibited. (p. 315.)

FORGERY—Evidence of.—On a trial for forgery, it is competent for the prosecution to prove that immediately before the date when the alleged forged check was cashed, the accused was without means and in need of money, and that immediately thereafter he had a considerable sum of money and presented a ten dollar bill in payment of a debt. (p. 316.)

G. F. Johnson and B. F. Leverett, for the plaintiff in error.

J. E. Pottle, solicitor general, for the state.

49 **BECK, J.** 1. The defendant Walker was indicted for the offense of forgery, one of the counts of the indictment charging that “said Reuben Walker and [a codefendant] did then and there falsely and fraudulently pass, utter and publish said check as true, well knowing that the same was falsely and fraudulently made, signed, forged and counterfeited.” And the judge charged the jury the law applicable to this count in the indictment. The movant excepted to this portion of the judge’s charge, alleging that “there was no evidence in the case to authorize same, and it gave the state the benefit of a theory to which it was not entitled under the evidence in the case.” In this connection Mr. Wynn, a witness for the state, testified as follows: “I was in the mercantile business in the early part of the year. Reuben Walker came to the store sometime in February. He came in the store and said he would trade some if he could get

his check for something like seventy dollars or eighty dollars cashed; that Mr. Cook [the prosecutor] had sold his half of the cotton, and his check was in settlement for it. This was in the latter part of February. I think he said the amount of the check was seventy-eight dollars or seventy-nine dollars. I did not ask to see it. He said it was on the Bank of Monticello, and that Mr. Cook had given it to him for his half of the cotton." The check alleged to have been forged was on the Bank of Monticello for the sum of seventy-nine dollars and eighty-three cents, and bore the date of February 27, 1906. Mr. Cook, referred to in the above testimony, swore: "I never gave Reuben Walker a check in my life. . . . I did not sign them [the checks alleged to have been forged], nor did I authorize any person to sign them for me. . . . I think the writing on the checks looks like Reuben Walker's."

The sole question presented in the first six grounds of the motion for a new trial is whether or not this testimony shows an uttering and publishing of the check in question. The portions of the court's charge therein complained of state correct principles of law, and it is only necessary to determine whether or not they were applicable to the facts in the case. Mr. Bishop, in his work on Criminal Law, eighth edition, volume 2, section 605, says: "Since the offense of uttering is an attempt, it is complete when the forged instrument is offered; an acceptance of it is unnecessary. . . . To complete the offense, there must be a representation of genuineness, but ordinarily this is implied in the act of uttering." And Mr. Wharton, in his work on Criminal Law, tenth edition, volume 1, section 703, says: "To ⁵⁰ utter and publish a document is to offer directly or indirectly, by words or actions, such document as good." In *State v. Horner*, 48 Mo. 520, the court says: "The law is well and definitely settled that the words 'utter' and 'uttering' mean substantially to offer. If a person offers another a thing—as, for instance, a forged instrument, or a piece of counterfeit coin which he intends to pass as good—that is an 'uttering,' whether the thing offered be accepted or not; and it is said that the offer need not go so far as to be in law a tender. But to constitute an uttering there must be a complete attempt to do the particular thing which the law forbids; though there may be a complete conditional uttering as well as any other, which will be criminal: 1 Bishop on Criminal Law, 1st ed., sec. 185,

and cases cited in notes. It has been expressly adjudicated that the allegation of uttering and publishing is proved by evidence that the prisoner offered to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it was good: *Commonwealth v. Searle*, 2 Binn. 332, 4 Am. Dec. 446; *United States v. Mitchell*, Bald. C. C. 367; *Rex v. Shukard*, Russ. & R. 200. See, also, *Smith v. State*, 20 Neb. 284, 57 Am. Rep. 832, 29 N. W. 923." Applying the above rules to the present case, we think that there was sufficient evidence to require the issue to be submitted to the jury under proper instructions from the court, and no error was committed in so doing.

2. The only other assignment of error which it is necessary for us to consider here is contained in the eighth ground of the amended motion, which complains that the court erred in permitting one Mr. McGauhey to testify that on or about the day the check was cashed, this defendant presented to him a ten dollar bill in payment of a debt; the objection to this evidence being that it was irrelevant. The court, however, did not err in admitting this evidence in connection with facts testified to by other witnesses, which showed that for some time immediately preceding the date said check was cashed the defendant had no money and was unable to pay a fine in the recorder's court, whereas immediately after the day said check was cashed he was seen in possession of a considerable sum of money, and paid witness, McGauhey, said debt. In the case of *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225, the court held that "it was competent in this case before us to prove that he in whose favor the alleged forged receipt was drawn, showing the ⁵¹ payment by him of a large sum of money, was at the date thereof in such embarrassed circumstances that it is improbable that he could have paid so large a sum. The evidence was competent, and was properly allowed to go to the jury, to be by them weighed for what it was worth, with the other evidence in the case." And the same reason applies to this evidence in the case at bar.

3. The evidence in this case, though circumstantial, was sufficient to authorize the verdict; and the judge having approved the same, it should be allowed to stand.

Judgment affirmed.

All the justices concur.

UTTERING OF FORGED INSTRUMENT—WHEN SUFFICIENT TO SUSTAIN CONVICTION.

- I. Uttering of Forged Instrument—What Constitutes Generally, 317.**
- II. Knowledge of Falsity and Intent to Defraud, 318.**
- III. Placing of Instrument of Record, 319.**
- IV. Pleading of Instrument, 320.**

I. Uttering of Forged Instrument—What Constitutes Generally.

To utter and publish an instrument alleged to have been forged is to declare or assert, directly or indirectly, by words or actions, that it is good, and proof that the accused has done this will sustain a conviction: *Folden v. State*, 13 Neb. 328, 14 N. W. 412. The offering of a forged instrument, with the representation by words or actions that it is genuine, is an uttering, whether the paper is accepted or not: *State v. Horner*, 48 Mo. 520. Offering to pass a forged instrument, asserting that it is good, constitutes an uttering, although the instrument is not accepted, and although it is payable to the order of a third person, and not indorsed: *Smith v. State*, 20 Neb. 284, 57 Am. Rep. 832, 29 N. W. 923. To constitute an uttering of a forged instrument, it is not necessary that it should have been actually received as genuine by the person upon whom the attempt to defraud is made; it is sufficient if it be offered as genuine, or declared or asserted by words or actions to be good; and to utter a forged instrument is to offer it whether it be accepted or not: *People v. Caton*, 25 Mich. 388. It has, however, also been decided that the crime of uttering and publishing a forged instrument is not complete until the paper is transferred and comes to the hands or possession of some person other than the accused, his agent or servant. Hence, where a note with forged indorsements is sent by the accused by mail from one county to a person in another county, for the purpose of obtaining credit upon it, the crime is not consummated until the note is received, and the proper place of trial is the county to which the note is sent: *People v. Rathbun*, 21 Wend. 509.

As instances of what may constitute an uttering of a forged instrument, it may be noted that if a person signs a will as an attesting witness, knowing it to be forged, and aids in obtaining its admission to probate by testifying to its genuine execution, he is guilty of uttering it: *Corbett v. State*, 5 Ohio C. C. 155. Collecting money on forged mortgage notes and indorsing the payments thereon is a sufficient uttering, whether the mortgage itself was produced at the time of payment or not: *Perkins v. People*, 27 Mich. 386. If a person knowing the contents of a forged letter, with intent to obtain money on it, delivers it, although sealed, to the clerk of the person to whom it is addressed, and whom he supposes to be authorized to open it, he is guilty of uttering it: *United States v. Carter*, 2 Cranch C. C. 243, Fed. Cas. No. 14,739. If a defendant, without any authority, signs his father's name to an order, and with it obtains money from a bank,

he is guilty of uttering and publishing a forged instrument, although he believed that his father would pay the order and not prosecute him: *Rose v. State*, 80 Ark. 222, 96 S. W. 996.

An attempt to utter a forged instrument by delivery to an agent or co-conspirator, with a design that such agent or co-conspirator shall utter it, is not complete until some overt act is done by the latter in uttering it, and an instruction that if the defendant "delivered the instrument to anyone knowing it to be forged, with intent to have it uttered, published, and passed as a true and genuine instrument with intent to cheat and defraud," he is guilty of uttering a forged instrument, is erroneous, as not necessarily including any overt act toward the commission of the crime: *People v. Compton*, 123 Cal. 403, 56 Pac. 44.

II. Knowledge of Falsity and Intent to Defraud.

To constitute the offense of uttering and publishing a forged writing it is necessary that there be an intent to defraud, and a knowledge of the falsity of the document on the part of the accused: *Elsev v. State*, 47 Ark. 572, 2 S. W. 337; *State v. Wills*, 70 Minn. 403, 73 N. W. 177. To constitute forgery by uttering or publishing a forged instrument or writing, it must be uttered or published as true, and must be known by the person uttering or publishing it to be false, forged or counterfeited, and the act must be done with intent to prejudice, damage or defraud another: *State v. Murray*, 72 S. C. 508, 52 S. E. 189. To convict a person of uttering, or attempting to utter, as true, a forged writing, it must be shown that the accused, himself, uttered, or attempted to utter, as true, the forged writing, or was present at the time such forged writing was uttered or attempted to be uttered, by some other person, aiding or assisting such person to utter it as true. It must also be further shown that the accused knew at the time that such writing was in fact forged, and that such uttering or attempting to utter was made or done by him with intent to defraud. But any assertion or declaration, by word or act, directly or indirectly, that the forged writing is good, with such knowledge and intent, is an uttering of such writing, provided such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the writing: *Chahoon v. Commonwealth*, 20 Gratt. 733; *Sands v. Commonwealth*, 20 Gratt. 800. Offering for sale and selling forged notes, knowing them to be forged, and that the purchaser buys relying upon their genuineness, constitutes a sufficient representation of their genuineness to constitute an uttering and publishing: *State v. Calkins*, 73 Iowa, 128, 34 N. W. 777. Proof of the transfer and delivery of a forged note, as collateral security for a loan of money, with knowledge that the note was false and forged, and with an intent to defraud, is sufficient to show an uttering and passing of the forged paper, and the fact that the bank to which it was passed did not suffer actual loss, nor find it necessary to realize on the

collateral, does not relieve the act of the accused of its criminal character: *State v. Calhoun*, 75 Kan. 259, 88 Pac. 1079. The presentation of a forged draft or order for money to the person to whom it purports to be directed for payment thereof, knowing it to be false and forged, although payment is refused, and the draft is returned to the presenter, is an uttering and publishing of a forged instrument: *People v. Brigham*, 2 Mich. 550. Pledging a forged, negotiable bill of exchange as security for the payment of goods taken on credit, with knowledge that it is forged, is as much the uttering of a forged instrument, as the giving of it in payment: *Thurmond v. State*, 25 Tex. App. 366, 8 S. W. 473. One authorized by a creditor to collect a debt has no authority, on receiving from the debtor in payment a check payable to the creditor, to indorse such creditor's name, and a person taking the check with knowledge of such false indorsement, with intent to obtain money thereon, based on such indorsement, and who does obtain money thereon, is guilty of uttering a forged check: *People v. Mingey*, 118 App. Div. 652, 103 N. Y. Supp. 627. One who forges a check and presents it to another with intent to obtain money on it, and thus defraud such other, is guilty of uttering and publishing a forged instrument: *State v. Bigelow*, 101 Iowa, 430, 70 N. W. 600. To sustain an indictment for uttering a forged check, knowing it to be forged, if it appears that the accused knew that the check was false and asserted its genuineness for the purpose of getting money, it is not necessary to show that the check was made by the defendant, or that the person whom the defendant sought to deceive was in fact misled: *Commonwealth v. Bond*, 188 Mass. 91, 74 N. E. 293. To support an indictment for uttering a forged instrument, it is not necessary to show that the defendant obtained anything of value, as the offense consists of uttering the forged instrument knowingly and with an intent to defraud: *State v. Phillips*, 78 Mo. 49.

III. Placing of Instrument of Record.

The putting of a forged deed of real estate on record as a genuine deed is an uttering and publishing of it, and proof of this fact will sustain a conviction for forgery: *Paige v. People*, 3 Abb. App. Dec. 439. Putting a forged deed of real estate on record is, in itself, an act of uttering and publishing it: *United States v. Brooks*, 3 McAr. (D. C.) 315. The presenting of a forged deed at the probate office for record is an uttering thereof: *Espalla v. State*, 108 Ala. 38, 19 South. 82.

The putting of a forged mortgage on record is also a sufficient uttering of it: *Perkins v. People*, 27 Mich. 386. A sufficient uttering of a forged mortgage is shown by evidence tending to prove that it was placed upon record by a person other than the mortgagee, though never delivered to the latter, if the object of placing it upon record was to obtain a loan from him and to otherwise defraud him: *People v. Baker*, 100 Cal. 188, 38 Am. St. Rep. 276, 34 Pac. 649. Leaving a forged

discharge of a mortgage collateral to notes, which it secures, in the proper office for record, is an uttering and publishing of an acquittance and discharge for money: *People v. Swetland*, 77 Mich. 53, 43 N. W. 779.

IV. Pleading Instrument.

Averring a forged deed in a pleading as a genuine deed is an uttering and publishing of it, and proof of this fact will sustain a conviction: *Paige v. People*, 3 Abb. App. Dec. 439. The bringing of a suit, as counsel, upon a forged note, recovering judgment thereon, and the filing of a bill to enforce such judgment and the payment thereof out of real estate of the person against whom the note is forged, having the land sold and receiving the proceeds, all with knowledge that such note was a forgery, is an uttering and publishing of the forged note within the meaning of the statute: *Chahoon v. Commonwealth*, 20 Gratt. 733.

ELLINGTON v. HARRIS.

[127 Ga. 85, 56 N. E. 134.]

EVIDENCE—Presumption as to Law of Another State.—The common law is presumed to prevail in another state. (p. 321.)

HUSBAND AND WIFE—Effect of Marriage at Common Law as to Wife's Chattels.—At common law, marriage amounts to an absolute gift to the husband of all the goods, personal chattels and personal estate, of which the wife is actually or beneficially possessed at that time in her own right. (p. 321.)

HUSBAND AND WIFE—Husband's Title to Chattels of Wife. If title to the personal chattels of a wife has vested in her husband by virtue of his marital rights, they remain his property until the title thereto is divested in some legal method. (pp. 321, 322.)

HUSBAND AND WIFE—Chattels of Wife—Investment of Proceeds of, in Land.—If title to the personal chattels of the wife has vested in the husband by virtue of his marital rights, and he has sold such property and invested the proceeds in land, taking title in his own name, he is still exercising dominion over it as his own, and if no complete gift of such chattels or of the proceeds to the wife is shown prior to the investment in the land, the husband is the absolute owner thereof. (p. 322.)

HUSBAND AND WIFE—Investment of Proceeds of Wife's Chattels in Land—Title of Husband and Divestment Thereof.—If land has been bought by the husband with the proceeds of property acquired from his wife by virtue of his marital rights, and the title thereto taken in his own name, without prior gift of such property or the proceeds thereof to his wife, the land becomes the absolute property of the husband, and his title thereto cannot become divested by mere admissions made from time to time, in his lifetime, that it belonged to himself and his wife's heir, that he held half of it in trust for such heir, or the like. (p. 323.)

TRUSTS—Establishment by Parol.—An express trust must be created or declared in writing, and cannot be established by parol evidence. (p. 323.)

G. I. Teasley and J. P. Brooke, for the plaintiff in error.

J. Z. Foster and P. P. Du Pre, for the defendant in error.

⁸⁵ COBB, P. J. J. P. Ellington, as administrator of T. R. Ellington, advertised certain land for sale as the property of his intestate. Mrs. Nannie Harris interposed a claim to an undivided half interest in the land. At the trial it appeared that the intestate died in possession of the land, and that the legal title to the same was in him. The evidence relied on by the claimant consisted of admissions made by the intestate, during his lifetime, that the land was purchased with money belonging to the wife; that during her lifetime he held it for her benefit; and that after her death he held it for the benefit of himself and the claimant, who were the only heirs of the wife. There was also evidence that at the time of making some of these admissions he stated that he married his wife in South Carolina, and that at the time of her marriage she had a certain sum of ⁸⁶ money and articles of personal property of which he took possession, and that the land was purchased with the proceeds of the property of his wife. It appeared from some of these admissions that the marriage of the intestate took place in 1867, and that he removed to Georgia after that date, bringing with him the personal property above referred to. The jury returned a verdict in favor of the claimant, and the administrator assigns error upon the refusal to grant a new trial.

There was no evidence as to what was the law of South Carolina. The presumption is that the common law prevailed at the time of the marriage of the intestate: *Massachusetts Life Assn. v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Thomas v. Clarkson*, 125 Ga. 78. The common law, as to the effect of marriage upon personal chattels of the wife, was thus stated by Judge Nisbet, in *Bell v. Bell*, 1 Ga. 637: "At common law, marriage amounts to an absolute gift to the husband of all the goods, personal chattels and personal estate, of which the wife is actually or beneficially possessed at that time in her own right. All these he acquires an absolute property in and dominion over by the marital right." The husband needed the interposition of no court to

establish his claim to the property of the wife in possession. He took it free from any right of survivorship; he might dispose of it during life or bequeath it at his death; and if he died intestate, it went to his personal representatives. As to choses in action the rule was different. The husband did not acquire title to them unless they were reduced to possession during coverture. If, at the time of the marriage of Ellington, in South Carolina, his wife was in possession of the money and personal chattels referred to in his admissions, the absolute title to the property vested in him, and remained in him until divested in some method provided by law. He might make a gift of this property to his wife, but anyone claiming under the wife, as donee from him, carried the burden of showing all the essentials of a gift. When he disposed of this property, and invested the proceeds in land, and took title in his own name, he was still exercising dominion over it as his own; and if no complete gift of the chattels was shown prior to ⁸⁷ the investment in the land, then he was the absolute owner of the land, the purchase money having been paid with his own property.

The judge instructed the jury, in effect, that it was immaterial what was the status of the property in South Carolina, provided they believed that the intestate had dealt with the property as the property of his wife after the same was brought into Georgia. The mere admission by the intestate that the land was purchased with property which he received from his wife would not be sufficient to make out a case in favor of the claimant. The evidence would have to go further and show that the husband had either made a gift of the personal chattels to the wife before they were disposed of and the proceeds invested in the land, or had made a gift of the proceeds before that time. In that view of the case what the status of the property was at the time it was brought into Georgia from South Carolina was material to the case, and the instruction of the judge was erroneous. If there had been no gift of the chattels or proceeds arising from their sale before such proceeds were invested in the land, then the land, at the time it was purchased and the title taken by the intestate, was the absolute property of the husband. If this is the truth of the case, then his title to the land cannot be divested by mere admissions, made from time to time, in his lifetime, that it belonged to himself and his daughter, that

he held half of it in trust for his daughter, and the like. Title to land must be evidenced by writing, and declarations of the character above indicated could not create for the benefit of the daughter an express trust in the land, for such trusts must be created or declared in writing: *Smith v. Williams*, 89 Ga. 9, 32 Am. St. Rep. 67, 15 S. E. 130. The admissions relied upon by the claimant, as above stated, were of two classes: 1. Simple admissions that the land had been bought with money belonging to the wife; and 2. That the land had been bought with the proceeds of property acquired from the wife by virtue of his marital rights. On another trial the jury should be instructed that if they believe from the evidence that the land was really purchased with money or property which belonged to the wife at the time that the purchase was made, they would be authorized to find in favor of the claimant; but, on the other hand, if they should believe that the land was purchased with money or chattels, title to which the intestate had obtained by virtue of his marital rights, under the law of ^{ss} South Carolina, that they would not be authorized to find for the claimant, unless they believe that the intestate, during the lifetime of his wife, had made a complete gift of the money and chattels, or the money and the proceeds of the sale of the chattels, prior to the time that the land was purchased and paid for with such proceeds.

Judgment reversed.

All the justices concur.

The Respective Rights of Husband and Wife in their personal property acquired by them by their marriage are determined by the law of the place of their matrimonial domicile, and this, in the absence of any contrary intention, is the domicile of the husband at the time of the marriage: *Parrett v. Palmer*, 8 Ind. App. 356, 52 Am. St. Rep. 479; *Birmingham Water Works Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43.

The Common Law is Presumed to prevail in states judicially known to be of common-law origin: *Birmingham Water Works Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43; but not in those states and countries wherein English institutions have not been adopted: *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa, 576, 104 Am. St. Rep. 367.

EVERETT v. TABOR.

[127 Ga. 103, 56 S. E. 123.]

EQUITY—Change of Status Pendente Lite—Relief.—If, upon the final hearing of a petition for an injunction, it appears that the equitable relief prayed for cannot be granted, because of a change in the status brought about since the filing of the action, the plaintiff may be awarded damages in lieu of the equitable relief sought. (p. 325.)

EQUITY—Relief Rendered Necessary by Acts Pendente Lite.—A plaintiff will not be cast out of a court of equity by conduct of the defendant subsequent to the filing of the suit, which renders it impossible to grant the relief originally prayed for, but in an appropriate case, the court will decree damages resulting from such conduct, though recoverable only upon facts independent of those pleaded in the original suit. (p. 326.)

EQUITY—Relief Rendered Necessary by Acts Pendente Lite.—Consummation of a fraud by the defendant pending the suit, rendering impossible the specific relief sought, will not deprive a court of equity of jurisdiction to grant other relief appropriate to the changed status. (p. 326.)

N. A. Morris and A. N. Edwards, for the plaintiff.

D. W. Blair, for the defendants.

103 EVANS, J. Everett filed an equitable petition against Tabor and Hipp, a constable, wherein he alleged that Tabor sued him in a justice's court and obtained a judgment, that Tabor fraudulently prevented him from entering an appeal to a jury in that court, and subsequently caused an execution to be issued and levied upon his property. The prayers of the petition were for process, injunction, and general relief. On the interlocutory hearing the court refused a temporary injunction, and this judgment was affirmed on writ of error to the supreme court. See *Everett v. Tabor*, 119 Ga. 128, **46** S. E. 72, wherein the allegations of the plaintiff's petition are fully set out. Afterward the plaintiff offered to amend his petition as follows: After the decision of the trial court was affirmed, "the defendants proceeded to advertise for sale the property **104** of plaintiff, described in said petition, to satisfy the fieri facias therein described. This was being done and the sale of the property would have occurred before the final hearing could be had on said case. To prevent this sale of petitioner's property, on the seventh day of January, 1904, petitioner paid off said fieri facias, which amounted to one hundred and sixty-two dollars and sixty-eight cents"; and

therefore petitioner "claims that by reason of the above-stated facts and the facts alleged in his original petition, Tabor has injured and damaged petitioner in the sum of one hundred and sixty-two dollars and sixty-eight cents, with seven per cent interest on the same from January 4, 1904. Wherefore, in lieu of the prayer for injunction, as prayed for in the original petition, petitioner now prays that he recover as damages against defendant, T. H. Tabor, said sum of one hundred and sixty-two dollars and sixty-eight cents, besides interest." The amendment was allowed and ordered filed; whereupon Tabor orally demurred to the petition as amended, on the grounds that no cause of action was set out, and that the original petition could not by amendment be changed from a suit for injunction into an action for damages. The court sustained the demurrer, and the plaintiff excepted.

The original petition was for relief against the enforcement of a judgment which had been regularly rendered against the losing party, who had a meritorious defense, but was prevented by the fraud of the other party from entering an appeal. If the allegations therein were true, the petitioner was entitled to the relief prayed: *Everett v. Tabor*, 119 Ga. 125, 46 S. E. 72. So the real question for determination now is, Did the amendment introduce a different cause of action from that alleged in the original petition? The amendment set up facts transpiring after the filing of the suit, and was in the nature of a supplemental bill. It appears from the amendment that the plaintiff cannot now be afforded the relief of injunction, since the executions have been paid. The amendment discloses that payment of the execution was not made voluntarily, but in order to release the plaintiff's property from seizure under the executions, and to prevent its sale by the constable: *Civ. Code*, sec. 3723; *First Nat. Bank v. Americus*, 68 Ga. 119, 45 Am. Rep. 476. Under the English equity practice, matters transpiring after the filing of a bill in equity were available by way of a supplemental bill; under our procedure, no supplemental petition need be filed, but all such matters may be set up by way of amendment: *Civ. Code*, sec. 4969. It is well settled that if, upon the final hearing ¹⁰⁵ of a petition for injunction, it appears that the equitable relief prayed for cannot be granted, because of a change in the status, brought about since the filing of the action, the plaintiff may be awarded damages in lieu of the equitable relief sought. Under our system of pleading, which

allows a joinder of equitable and legal causes in the same action, a plaintiff may abandon his equitable cause and insist on his purely legal remedy. In such a case, where he elects to recover damages, ordinarily he is limited to the damages flowing from acts committed prior to the suit, and cannot by amendment bring into the case occurrences subsequent to the suit as a basis for damages. This general rule is not applicable to a cause of action purely equitable in its nature, where the damages claimed from happenings subsequent to the filing of the petition cannot be recovered independently of the original equity in the petition, and which are dependent upon and consequential from such equity. The suitor will not be cast out of a court of equity by conduct of the defendant subsequent to the filing of the suit which renders it impossible to grant the relief originally prayed, but in an appropriate case the court will decree damages resulting from such conduct which cannot be recovered independently of the facts pleaded in the original suit: *Ivey v. Georgia etc. R. Co.*, 84 Ga. 536, 11 S. E. 128; *Illges v. Dexter*, 73 Ga. 362. When the defendant Tabor was successful in defeating the grant of a temporary injunction, he had his election to either press his executions to sale or to await the final determination of the controversy between himself and the plaintiff. If the plaintiff had been unable or had refused to pay the executions and a sale of his property was had thereunder, he would still have been entitled to press his case before a jury; and if he succeeded in establishing the fraud as alleged, he could have recovered such damages as resulted from the consummation of the fraud in subjecting his property to seizure and sale. The enforced payment of the executions by the plaintiff fixed the measure of his damages, in the event he established his right to prevail in the pending suit. This view is borne out by what is said by McCay, J., in *Sharpe v. Kennedy*, 51 Ga. 257. The matters set up in the amendment were germane to the cause of action alleged in the original petition, and the court erred in dismissing the action.

Judgment reversed.

All the justices concur.

A Court of Equity Which has Acquired Jurisdiction of a cause for any purpose will usually retain it to do complete justice between the parties, even to applying legal remedies: Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 113 Am. St. Rep. 170; *Vaught v. Meador*, 99 Va.

569, 86 Am. St. Rep. 908; Hazen v. Webb, 65 Kan. 38, 93 Am. St. Rep. 276; note to Deepwater Ry. Co. v. Motter, 116 Am. St. Rep. 877. It cannot be ousted of jurisdiction simply because in the development of legal means redress becomes attainable at law: *Smithson v. Smithson*, 37 Neb. 525, 40 Am. St. Rep. 504; *Herring v. Wilton*, 106 Va. 171, 117 Am. St. Rep. 997.

GEORGIA RAILROAD AND BANKING COMPANY v. HAAS.

[127 Ga. 187, 56 S. E. 313.]

CONTRACTS—Forfeitures—Notice.—If a provision for a forfeiture contained in a contract is dependent upon the giving of a certain written notice, and it be such that it can be enforced, it must appear that the notice was given in compliance with the contract both as to time and contents, and that default has occurred. (p. 329.)

RAILROADS—Rails as Fixtures—Abandonment of Track.—A land owner from whom a railroad right of way has been obtained cannot claim the rails and fastenings laid for the purpose of operating the road as being fixtures forming part of the land itself and not removable by the railroad company or its transferee, in the absence of evidence on the part of the latter to abandon to the land owner such rails and fastenings. (p. 330.)

CARRIERS—Wrongful Delivery of Goods.—A carrier has no right to refuse to recognize the demand of the true owner of property, made while such property is in the carrier's possession and duly pressed, and carry it away and deliver it to a person who does not own it, or to his order, merely because the carrier received it from such person as consignor. By such act the carrier renders himself liable. (p. 331.)

CARRIERS—Right of Owner of Property to Reclaim It When Shipped by Another.—If one not the owner of property delivers it to a carrier for shipment, the true owner, who is not a party to the contract of shipment, may, while the property is in the possession of the carrier, demand and reclaim it, and, upon refusal, enforce his demand by suit. (p. 332.)

CORPORATIONS—Sale of Franchise as Relief from Liability.—A corporation charged with a duty to the public cannot, by sale or otherwise, dispose of its property or franchises so as to relieve itself from liability for acts done or omitted without legislative sanction expressly exempting it from liability. (pp. 332, 333.)

RAILROADS—Lease of—Liability.—If a railroad company makes a lease to, or licenses another to exercise its franchises, in whole or in part, without express legislative authority, it remains liable for the acts of the lessee or licensee in such operation. (p. 333.)

RAILROADS—Lease of Franchise—Conversion—Liability of Lessor.—If the lessee of a railroad company's property and franchises, while in the operation of the road as a common carrier, commits a conversion of property, the lessor is liable therefor. (pp. 333, 334.)

RAILROADS—Lease of—Act of Lessee—Pleading.—In an action against a railroad company to recover for the act of its lessee, it is the better pleading to allege whether the act complained of was committed by the lessee or by the lessor. (p. 338.)

Alexander & Powers and S. McDaniel, for the plaintiff in error.

Westmoreland Brothers, for the defendant in error.

¹⁸⁸ LUMPKIN, J. For the purpose of aiding in the construction of a contemplated suburban electric railway, certain land owners made donations of land and gave rights of way. The company entered into a written agreement with some of them, which contained the following among other provisions: "It is further agreed and understood between the parties to this contract, that in case said railroad company fails and refuses to comply with its part of this contract in operating said railroad after the same is built, and continues to fail and refuse to comply with the same after having been given thirty days' notice by said Southern Land & Loan Co., or by Mrs. Leila L. Sisson or L. M. Cassels as far as the frontage of the abutting property of said Sisson & Cassels is concerned, they having contributed to the furnishing of the street or way and the donation hereinbefore mentioned, in writing, directing it to comply with said contract, then the part of said Electric Company and other improvements built upon the ¹⁸⁹ route furnished by said Southern Land & Loan Co., or along the present frontage of the property of said Sisson or said Cassels on said line, shall be forfeited to said Southern Land & Loan Co., where it owns the entire frontage along said route, or to said company and said Sisson or to said company and said Cassels, respectively, where such parties have contributed to the furnishing of said route as aforesaid, in proportion to their frontage along the route of said car line, or to such person as it or they, jointly or severally, may designate, and it or its agents, or they and their assigns, shall have the right to take charge of same and operate it, sell or do whatever they may choose to do with the same." This was not recorded. Other land owners had with this company verbal agreements of a similar character. The main line of the road and an extension or branch were each covered by a mortgage, and upon foreclosure were sold separately. The purchaser of the extension or branch conveyed it to the present plaintiff. The extension was built passing under the Georgia railroad, and a temporary culvert constructed, with an agreement that a permanent structure should be erected, which was not done. The court ordering the sale

placed upon the purchaser at foreclosure sale the duty of building the permanent culvert; but he declined to do so on account of the expense. Thereupon the Georgia Railroad and Banking Company filled up the opening with dirt, and the cars could not pass under its track. The purchaser determined to remove the track, but was stopped by temporary restraining orders at the instance of property owners along the extension. The suits have never been disposed of. The same property owners, except one, then took up the rails along and through their lands, sold them to a third party, and intended to ship them away. For this purpose the rails were loaded on cars of the defendant and were consigned to the shippers' order, deliverable at a distant point. Neither the railroad company nor its lessees knew of the injunction proceedings, nor anything as to the title to the rails or whence they came, but accepted them in the ordinary course of business. The Georgia Railroad and Banking Company had leased out its line, and by assignment two companies became the lessees, and are operating the road under the name of the Georgia Railroad Company. The rails being loaded on the defendant's cars and standing on its tracks, the plaintiff, who held by conveyance under the purchaser at foreclosure sale, served the local agent of ¹⁹⁰ the lessees with a written demand therefor, directed to defendant, which being refused, the plaintiff brought an action in trover. A money verdict was rendered for the plaintiff. A motion for a new trial was made and overruled, and the defendant excepted.

1-3. It does not appear from the agreed statement of facts in the record that the land owners gave the thirty days' written notice provided by the contract as a condition precedent to exercising the right to take charge of the branch road on default of compliance by the railroad company. They did obtain a restraining order to prevent the purchaser or his transferee from tearing up the rails; and then proceeded themselves to do the tearing up while the case was pending. Where a forfeiture is dependent upon the giving of a certain written notice, if it be such as can be enforced, it must appear that the notice was given in compliance with the contract both as to time and contents, and that the default occurred. Considered from the standpoint of a condition subsequent by contract, there was no forfeiture. Moreover, the condition was not in the deeds, but as to some of the grantors apparently in a separate paper unrecorded, of which the

mortgagee and purchaser are not shown to have had notice; and as to others it rested merely in parol. The railroad company, not the land owners, was in possession of the right of way, and its possession gave no notice of any such condition or agreement.

If there was no forfeiture by virtue of the contract, was there a forfeiture by abandonment? In *Carr v. Georgia R. R.*, 74 Ga. 73, the deed contained an agreement for a reversion on the termination of a particular use. In *Wright v. Dubignon*, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669, a tenant sought to remove a servant's room, metallic gutters and water-pipes laid under the ground. In *Richards v. Gilbert*, 116 Ga. 382, 42 S. E. 715, counters, tables, etc., were held not to be covered by a mortgage of realty, it being agreed that they should not be so. The distinction between these cases and the one at bar is easily seen. In *Charleston & N. C. Ry. Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972, where a life tenant had made a conveyance of land to a railroad company, and rails and ties forming a part of its line of railroad had been placed on such land, upon the death of the life tenant it was held that the remainderman could not, in an ¹⁰¹ equitable proceeding, eject the company and claim the rails, ties, etc.; but the railroad company could remove them, or pay for the land, not including them. In the case now before us there is no evidence of any intention on the part of the purchaser to abandon to the land owners the rails and fastenings, and the doctrine of the abandonment of trade fixtures has no application. There may have been an intention to take up the rails and then abandon the land, but the effort to remove the rails directly negatives any intention to abandon them. This is not a question of whether a quasi public corporation can abandon its franchises or cease to operate them at will; but a claim that the track and roadbed had both been abandoned and reverted to the original owners of the land, and that the rails were such a part of the realty that they could not be removed by the purchaser at foreclosure sale or his transferee: See, on this subject, *Elliott on Railroads*, sec. 998, p. 1447; *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770; 23 Am. & Eng. Ency. of Law, 2d ed., 706; *McNair v. Rochester R. Co.*, 14 N. Y. Supp. 39; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. 28; *Northern Central Ry. Co. v. Canton Co.*, 30 Md. 347.

4. A carrier cannot refuse to recognize the demand of the true owner of property, made while such property is in the carrier's possession and duly pressed, and carry it away and deliver it to a person who does not own it, or his order, merely because the carrier received it from such person as consignor. There may be some authority tending to sustain this position, but we think the better view is to the contrary. It may be inconvenient for a common carrier to have two claimants for goods in his possession; but so it is for any other bailee or depositary. The rule that a carrier is estopped from denying the title of his consignor is not without exception in this state. Section 2286 of the Civil Code is as follows: "The carrier cannot dispute the title of the person delivering the goods to him, by setting up adverse title in himself, or a title in third persons, which is not being enforced against him." Hutchinson on Carriers, second edition, section 407, thus deals with the subject: "In such cases, however, if it should turn out that such claimant has not the paramount title as against the bailor, the withholding the goods by the carrier from the latter will be treated as a conversion by him. And so, when a demand is made upon him by the adverse claimant, if the carrier should refuse to surrender the goods to him, ¹⁹² he will be equally guilty of a conversion if the title of such claimant should prove to be the better, and he, as the true owner, was really entitled to them. Where, therefore, the title to the property is disputed, and it becomes difficult or impossible for the carrier to determine who is entitled to them, he may be placed in a perilous position; for no matter to which he gives up the goods, whether to the bailor or in pursuance of his directions, or to the adverse claimant, he will be in danger of being held to account for them by the other, as for a conversion, if he can show the better title. Under such circumstances, it sometimes becomes advisable for the carrier, instead of taking it upon himself to determine between the conflicting claims, to bring the parties before the proper legal tribunal by a bill of interpleader, in order that the parties may litigate the question of title inter sese, and have it there determined. He may, however, generally avoid the expense and delay of such a proceeding by delivering the property to the party who seems best entitled to it, upon being indemnified by him against loss in case it should turn out otherwise." The carrier may be entitled to a reasonable time

to investigate: Hutchinson on Carriers, 2d ed., sec. 408. But here no time was asked.

It is suggested that if the carrier yielded to the demand of the true owner and delivered the property to the latter, he could have set this up as a defense against the person delivering the property for shipment; but that it is optional with the carrier whether he will do so, or will transport the goods, deliver them to the consignor's order, and leave the true owner to look alone to the consignor for redress. Is this position sound? Why can the carrier deliver the property to the true owner, unless the owner is entitled to possession, in spite of the shipment by another? Certainly a carrier cannot deliver property to a person who has no right of possession, and successfully defend himself by reason thereof. If there is a right of possession, duly asserted and enforced, can the carrier disregard it? In *Western Trans. Co. v. Barber*, 56 N. Y. 544, it is said: "When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title." In *Hentz v. Idaho*, 93 U. S. 575, 23 L. ed. 978, Mr. Justice Strong, in the opinion, says: "But if he [the bailee] has performed his legal duty by delivering the property to its true proprietor at his demand, he is not answerable ¹⁰³ to the bailor. And there is no difference in this particular between a common carrier and other bailees": See, also, 5 Am. & Eng. Ency. of Law, 2d ed., 196, and citations; *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Savannah etc. R. Co. v. Wilcox*, 48 Ga. 432; *Shellenberger v. Fremont etc. R. Co.*, 45 Neb. 487, 50 Am. St. Rep. 561, 63 N. W. 859; *Wells v. American Exp. Co.*, 55 Wis. 23, 42 Am. Rep. 695, 11 N. W. 537, 12 N. W. 441; *Savannah H. & W. R. Co. v. Talbot*, 123 Ga. 378, 51 S. E. 401; *Atlantic & B. R. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530. Here the true owner was not a party to the contract of shipment and was in no way bound by it. His property was taken and was being carried away by a carrier. He demanded it while it was in the carrier's possession, and, upon refusal, proceeded promptly to enforce his demand by suit.

5, 6. Section 1864 of the Civil Code declares that "A corporation charged with a duty to the public cannot, by sale or otherwise, dispose of its property or franchises so as to relieve itself from liability for acts done or omitted, without

legislative sanction expressly exempting it from liability": See, also, *Singleton v. Southwestern Ry. Co.*, 70 Ga. 464, 48 Am. Rep. 574; 23 Am. & Eng. Ency. of Law, 2d ed., 748(c); *Georgia R. & B. Co. v. Tice*, 124 Ga. 459, 52 S. E. 916; *Hawkins v. Central of Georgia Ry. Co.*, 119 Ga. 159, 46 S. E. 82.

Much of the confusion and diversity of rulings in regard to the liability of a railroad company for acts of another person or corporation operating its line arises from a failure to accurately and exactly apprehend the question to be determined, and then to apply the underlying principle to the particular case. A railroad company is charged with certain duties to the public. It cannot devolve the exercise of its franchises upon another person or corporation without the express consent of the state; and it has no implied power to lease its road and franchises, and thus affect the public. If it makes a lease, or licenses another to exercise its franchises in whole or in part without express legislative authority, it remains liable for the acts of the lessee or licensee in such operation. If, under express legislative authority, a railroad company leases its property and franchises to another, reserving no control in the use of the property or the exercise of the franchises, but the lessee has exclusive control, some courts hold that the lessor is not liable for damages arising from the negligence of the lessee, unless the statute authorizing the lease expressly or impliedly reserves a continuing liability in the lessor for the torts of the lessee. Other courts, however, hold that the lessor is liable for the torts of the lessee, irrespective ¹⁹⁴ of whether the lease was authorized by the state or whether the liability of the lessor was reserved by statute, unless there was an express legislative exemption; See, on this subject, 2 Thompson on Negligence, sec. 1955; *Freeman v. Minneapolis Ry. Co.* (Minn. 1881), 7 Am. & Eng. R. R. Cas. 410, 413, and note. In *Central R. R. Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66, Bleckley, C. J., said: "There is no less scepticism in law than in theology. This court is called upon again and again for a fresh revelation of some legal truth which has already been revealed. After the cases of *Macon etc. R. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678, *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464, 48 Am. Rep. 574, and *Chattanooga etc. R. R. Co. v. Liddell*, 85 Ga. 482, 21 Am. St. Rep. 169, 11 S. E. 853, it would seem that there could be no reasonable doubt of the liability of a chartered railroad company permitting another company to run

trains over its railway, and thus to use its franchise, to respond for any damage occasioned by negligence, whether its own or that of its lessee or licensee." In *Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574, it was said that "It requires not only the consent, but a release by the legislature, to absolve them from the obligations which they owe the public." As will be seen from the quotation above made from the code, the principle that the lessor is not relieved from liability without legislative sanction expressly exempting it has been codified and adopted as a part of the law of this state.

It is contended by counsel for plaintiff in error in their brief that "a railroad company is responsible for its lessee's neglect to maintain and operate the road, as well as for any damage arising from a refusal by the lessee to discharge an imposed duty, or any negligence in the carrying of goods or passengers or running its trains, by reason of which damage results to a shipper or passenger or person injured by reason of such negligence," but not further; and that this case does not fall within the rule. In this view we cannot concur. It is agreed that the property was loaded on the cars of the defendant and was to be transported to a distant point. The act of the lessees in receiving, transporting and delivering the property could only be done by virtue of the franchises of the defendant company. The conversion complained of was accomplished by acts done under such franchises. The lessees could not have accomplished it at all, as it was done, except by reason of the lease ¹⁹⁵ and in acting under it. For a conversion thus brought about the original company was liable.

The ruling that the lessor would not be liable to one of the servants of the lessees for an injury resulting from negligence of a fellow-servant, and not from any failure of duty on the part of the lessor (*Augusta & K. R. Co. v. Killian*, 79 Ga. 234, 4 S. E. 165; *Banks v. Georgia R. & B. Co.*, 112 Ga. 655, 37 S. E. 992), is quite different. The servants thus concerned were not servants of the lessor, but of the lessees. The liability of a railroad company in this state for injury to one fellow-servant by reason of the negligence of another, where he himself is free from fault, is a statutory exception to the general rule of nonliability of a master to one servant for injury arising from negligence of a fellow-servant.

7. Counsel for plaintiff in error say in one of their briefs that the action was brought against the Georgia Railroad and

Banking Company, while the evidence showed that the conversion, if any, was committed by their lessees. A general motion for a nonsuit was made, but it does not appear that any distinct question was raised before the trial court, either by plea or objection to evidence or in the motion for a nonsuit, as to the necessity for alleging the lease and that the lessees committed the conversion. Aside from the question of the liability of a lessor railroad company for the acts of its lessee, what is the proper pleading in such a case? On this subject there seems to be little authority. In many cases the action was brought directly against the lessor for acts of the lessee, apparently without alleging any lease, and a recovery was sustained: See *Nelson v. Vermont etc. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Illinois C. R. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *New York etc. R. Co. v. Winans*, 17 How. 30, 15 L. ed. 27; *Ingersoll v. Stockbridge R. Co.*, 8 Allen (Mass.), 438; *Washington etc. R. R. Co. v. Brown*, 84 U. S. (17 Wall.) 445, 21 L. ed. 675; *Chicago etc. R. Co. v. McCarthy*, 20 Ill. 385, 71 Am. Dec. 285; *Peoria etc. R. Co. v. Lane*, 83 Ill. 448; *Quested v. Newburyport & Amesbury Horse R. Co.*, 127 Mass. 204. In Massachusetts there is a statute (somewhat similar to that in Georgia as to reserving liability of the lessor) which provides for the power to lease, but declares that such lease or contract shall not exempt the lessor from any duties or liabilities to which it would otherwise be subject. In none of these cases was the direct point raised and decided as to whether, in a suit against a lessor for acts of the lessee, if the lease be authorized, but the liability ¹⁹⁶ of the lessor be reserved, the negligence or conduct complained of may be alleged directly as that of the lessor, or whether it should be alleged as that of the lessee or its agents, for which, under the law, the lessor is liable. In Missouri the court of appeals has several times considered the question, but the rulings have not been uniform. As holding that an allegation that the act was done by the lessor was sufficient, see *McCoy v. Kansas City etc. R. Co.*, 36 Mo. App. 445; *Prie v. Barnard*, 70 Mo. App. 175; contra, see *Main v. Hannibal etc. R. Co.*, 18 Mo. App. 388; *Brown v. Hannibal etc. R. Co.*, 27 Mo. App. 394.

Constructions of particular statutes and statements as to what is necessary to be averred under them throw but little light on the general question. An illustration of this will be found in *Pittsburgh etc. Ry. Co. v. Hannon*, 60 Ind. 417.

With meager light from outside sources on the subject of what the pleadings should allege, where it is sought to hold the lessor liable for the conduct of the lessee, we turn to the decisions of this state touching upon the subject. In *Central R. Co. v. Brinson*, 64 Ga. 475, it was held that "Although one railroad may be leased to and operated by another, by which the latter makes itself responsible for acts done on the road leased, yet neither loses its identity, and any tort committed upon the line of the one or the other should be so alleged and proved. Especially is this true where both roads are constructed through the territory of the same county." This, however, merely holds that, where it is sought to hold a lessee company liable for its acts in operating the leased road, the fact of the lease or operation should be alleged. In *Central R. R. v. Whitehead*, 74 Ga. 441, Hall, J., held that while it might have been sufficient to have alleged that the railroad company sued controlled and operated the road where the injury occurred, without specifying the particular character of agreement under which this was done, yet where the plaintiff alleged with needless particularity or unnecessary circumstances what might have been more generally stated, he was bound to prove the fact as alleged; and therefore, having alleged that one railroad operated another under a lease, it was necessary to prove the lease, and this could not be done by parol where the lease was in writing. In his opinion he said: "It would have been sufficient to allege that the defendant controlled and operated the road, without specifying the particular character ¹⁹⁷ of the agreement under which it was so held and operated." The majority of the court did not differ from this statement, but held that the fact of the lease might be proved without producing the writing, on the ground that nothing in the writing could prevent the liability of the actual carrier holding itself out to the public as such, if it were negligent. This also was a suit against a lessee. In *Ileins v. Savannah etc. R. Co.*, 114 Ga. 678, 40 S. E. 710, it was held that an action against a railroad company as a lessor or licensor of another company, for permitting such company to inflict injuries upon the plaintiff, could not be converted by amendment into an action against the same defendant as a common carrier of passengers, for inflicting the alleged injuries through its own servants and agents; and that where the allegation was that the injuries were inflicted by the agents of the lessee company, and nothing appeared to show that they

were so inflicted, a nonsuit was properly granted. At first view this decision seems to bear quite directly upon the point now under consideration. In so far as it holds that, in a suit against a railroad company for an alleged injury, an allegation that it was inflicted by the servants of the licensee, for whose conduct the defendant was legally liable, could not be amended so as to strike the allegation as to the licensee's agents, and thus charge the defendant company directly with the acts of negligence alleged to have caused the injury, the decision is, to say the least, of very doubtful correctness as an original proposition; and in principle it directly conflicts with the ruling in the older case of *Central R. R. v. Whitehead*, 74 Ga. 441. In that case Hall, J., held that "An amendment alleging that the railroad, on the line of which an injury was received, was held under a lease, and operated by another railroad company, against which suit was brought, was properly allowed." As to this point the other members of the court appear to have concurred with him; and they must have done so, because they affirmed the judgment of the court below. In regard to it, therefore, the decision must be treated as made by the entire bench. On the subject of amendments see, also, Civ. Code, sec. 5098; *Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. 809; *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318; *Price v. Barnard*, 65 Mo. App. 649. The justice who wrote the decision in the *Heins* case (114 Ga. 678, 40 S. E. 710) cited the case of *Central of Georgia Ry. Co. v. Williams*, 105 Ga. 70, 31 S. E. 134, as directly in point. But we do not think it was so. In that case a suit was brought against the defendant, ¹⁹⁸ alleging that the relation of master and servant existed between it and the plaintiff, and the gist of the action was that the master had negligently failed to provide a safe place for the servant to do his work. It thus rested upon the duties growing out of the relation between master and servant. It was sought to amend the petition by changing the whole character of the action and alleging that the plaintiff was not the servant of the defendant, but the servant of a tenant whose landlord the defendant was, and that a certain duty to repair rested on the landlord. The duty of a master to his servant and the duty of a landlord to his tenant or the servants of his tenant are two entirely different things. In the case of holding a railroad company liable for the acts of its licensee or lessee, or the servants of

the latter, such liability rests on the original duty of the railroad company, and the fact that it cannot of its mere volition shift its liability to another. The cause of action arises from a failure to discharge certain duties growing out of its charter and franchises, whether it seeks to discharge them itself through its own agents, or whether it delivers its property and franchises to a lessee for operation. It is not at all similar to the case of *Central of Georgia R. Co. v. Williams*, 105 Ga. 70, 31 S. E. 134.

From the foregoing discussion it would seem to be better pleading, in the absence of any statutory provision, to allege whether the act complained of was committed by the railroad company itself through its own employés or by the employés of the lessee or licensee. If the point were specifically made at the proper time, perhaps it might be necessary to amend in order to adjust the pleadings to the evidence. But this could be done. Here error is assigned on the refusal to grant a general motion for nonsuit, and because the verdict was not authorized by the evidence. Almost the entire argument in this court was based upon the contention that the defendant was not liable for the conversion by its lessees, and the *Heins* case (114 Ga. 678, 40 S. E. 710) was only cited passingly in one of the briefs. The ruling in that case as to the grant of a nonsuit was merely that where the allegation was that a licensee did the injury complained of (whether necessary or not to have been made), the proof must sustain it.

Since this action was brought in 1896, an act has been passed (Acts 1899, p. 54) requiring all railroad companies leasing or which have already leased their property or line of railroad to record such ¹⁹⁰ lease in each county through which the road may run, and declaring that a failure so to do will authorize any person having a right of action against such railroad or the lessee or lessees thereof, including employés, to file and prosecute the action against said railroad company in all respects as if the same were the proper party, and declaring that no plea or other defense seeking to shift liability to such lessee or lessees or denying the control or possession of such property shall avail as against such suit either by an employé or a member of the general public. Such act is of course prospective, and its passage is merely mentioned as bearing on cases arising subsequently thereto.

8. Counsel for plaintiff in error contend with ability and ingenuity that under the peculiar terms of the charter of

the Georgia Railroad and Banking Company (Acts 1833, p. 262; Acts 1835, p. 180) it is not subject to the general rule of liability for the acts of its lessees above referred to. But the agreed statement of facts shows that it has leased the right to operate the entire railroad. If the original company leased its road and turned over the operation of its franchises to others, it is subject to the rule. When the original charter was granted, railroad building was in its infancy, and turnpikes were great public highways. Certain expressions were used which seem perhaps rather inapt to modern railroad conditions. But in view both of the charter and the general law, the legislature never intended that lessees could take the place of the original company in the operation of its cars and franchises as a railroad company, and the original company be entirely freed from liability in connection therewith.

In the brief of counsel for defendant in error an attack is made on the legality of the lease and of the possession of the lessees, because the original lease was to an individual who, it was claimed, could not exercise the franchises, and because the present holders are foreign corporations. But, under the views we have expressed above, this question is not material, since we hold that a legal lease does not operate to prevent liability: See on this subject, however, *Georgia R. R. & B. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315. Under the evidence the plaintiff was entitled to recover, and there was no error in overruling the motion for a new trial.

Judgment affirmed.

All the justices concur.

The Effect of a Transfer by a Corporation of its assets or franchises to another corporation, as affecting the liabilities of the two companies, is discussed in the note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548. The effect of the consolidation of corporations is the subject of a note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604.

Conversion of Personal Property sufficient to sustain trover is the subject of a note to *Bolling v. Kirby*, 24 Am. St. Rep. 795.

TOWNSEND v. SOUTHERN PRODUCT COMPANY.

[127 Ga. 342, 56 S. E. 436.]

ASSIGNMENT OF NOTE for Purchase Money of Personalty.—The assignment of a note without recourse, given for the purchase money of personalty, the title being retained in the seller until the purchase money is paid, does not extinguish the security, but the assignee is subrogated to the title, which was vested in the original seller until the purchase money is paid. (p. 341.)

SALES—Retention of Title in Seller—Liens.—A retention of the title in the seller of personalty until the purchase price is paid, while affording a means of security, is not a lien. (p. 342.)

SALES—Assignment of Note for Purchase Price—Effect of Lien on Subsequent Mortgage.—An assignment of a note for the purchase price of personalty, the seller retaining the title thereto, until such price is paid, vests the title in the assignee until the purchase price is paid, and such title is superior to the lien of a subsequent mortgage, although the assignee bought the property from the original purchaser after the execution of the mortgage, and took a bill of sale thereto, containing a stipulation that the title was conveyed subject to liens of record. (p. 342.)

CONTRACTS—Parol Evidence to Vary.—If a stipulation in a bill of sale is clear and unambiguous, parol evidence is inadmissible to vary, add to, or contradict it. (p. 342.)

S. C. Townsend, for the plaintiff.

R. G. Dickerson and Wilcox & Patterson, for the defendant.

342 EVANS, J. This was a claim case. Townsend caused a mortgage fieri facias to be levied upon certain personal property as the property of Snyder, and the Southern Product Company interposed a claim thereto. On the trial it appeared that the defendant in fieri facias was in ³⁴³possession of the property described in the levy, at the date of the execution of the mortgage. The property was purchased by Snyder from Lewis Patterson & Company, who took from Snyder a purchase money note wherein title was retained in the seller until the purchase price was paid. This note was recorded in the office of the clerk of the superior court of Clinch county on November 13, 1902. Subsequently Snyder mortgaged the property to Townsend, subject to the purchase money note held by Lewis Patterson & Company, and this mortgage was recorded in the office of the clerk of the superior court of Clinch county on November 24, 1902. Afterward Snyder sold this same property to the Southern Product Company, executing a bill of sale containing a clause to the effect that the title to the property was conveyed to

the company, "subject only to the liens of record in the office of the clerk of the superior court of Clinch county, Georgia." A short time after the purchase by the Southern Product Company of the equity of redemption in this property from Snyder, it paid off the purchase money note held by Lewis Patterson & Company, and caused the note to be assigned to it. Upon this evidence the judge directed a verdict for the claimant; whereupon the plaintiff in fieri facias sued out a bill of exceptions, complaining of the direction of a verdict, and of the rejection of certain evidence which the court excluded.

1. The rule that where a vendor of land takes notes for the purchase money, securing their payment by reservation of title in himself, which notes he afterward transfers without recourse, and without any transfer of the reserved title, to a third person, this operates as a payment of the purchase money and extinguishes the interest of the vendor in the land, is not applicable where the subject matter of the sale is personalty, and the assignment of a note given for the purchase money of personalty, where the title is retained in the seller until the purchase debt is paid, does not extinguish the security, but carries it on. The assignee is subrogated to the title which was vested in the original seller: *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292. In this case it was held that "The fact that the assignment is made without recourse makes no difference." This decision was predicated upon the act approved October 22, 1887 (Acts 1887, p. 62). Subsequently it was held that "When a promissory note for the purchase money of personal property, which contains a reservation of title to the property in the payee until ³⁴⁴ the note is paid, is by the payee transferred for value to a third person without recourse, the title reserved for securing the payment of the debt is divested; and if, at the time of such transfer, the title so held is not likewise transferred to the purchaser of the note as a security in his hands, it vests in the maker, and the transferee becomes an ordinary creditor of such maker": *Burch v. Pedigo*, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808. The case of *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292, was not referred to in the case just cited, and there is a conflict between those cases as to the effect of such a transfer without recourse. However, in the *Burch* case it was recognized that such a transfer, if unconditional, would carry to the trans-

feree the title reserved by the terms of the note in the payee. The record in the present case shows that the transfer of the note reserving title was without condition, and it is therefore unnecessary to attempt to reconcile or point out the differences between the two cases cited. It might not be inappropriate to remark, in passing, that the principle announced in *Burch v. Pedigo*, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808, has been several times since followed: *McCullough v. Pritchett*, 120 Ga. 585, 48 S. E. 148; *Bradley v. Cassels*, 117 Ga. 517, 43 S. E. 857. But in none of these cases is the principle announced in the first headnote questioned.

2. Plaintiff in error contends that inasmuch as the transferee had bought the property from the original purchaser before taking the transfer of the purchase money note reserving title in the original seller, the effect of the transfer would be to extinguish the title so reserved. This contention is based upon the theory that the title reserved is in effect only a lien, and when the owner of the property takes an assignment of the lien to himself, the lien becomes extinguished. The obvious reply to this contention is that the title reserved, while affording a means of security, is not a lien. The transferee, by the assignment, acquires such title as the transferrer had, and that title is complete for the purpose of the collection of the debt until the purchase money has been paid.

3. From the statement of facts it will be seen that at the time the claimant bought the property from the original purchaser he took a bill of sale containing a stipulation to the effect that the title was conveyed subject to the liens of record, one of which was the mortgage lien of plaintiff in fieri facias. On the trial the plaintiff offered himself as a witness to prove that he assisted in the preparation of the bill of sale from the defendant to the claimant, and ³⁴⁵ that this clause was inserted for the express purpose of having the claimant assume and pay off all liens of record in the office of the clerk of the superior court of Clinch county. This testimony was repelled by the court, and properly so. The stipulation in the bill of sale was clear and unambiguous as to its meaning, and in such cases parol evidence is inadmissible to vary, add to or contradict the same.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

If a Contract for a Conditional Sale provides that title shall remain in the vendor to secure the purchase price, while possession of the property is delivered to the vendee, the assignment of the contract by the vendor carries with it the right of property, together with the right of possession for condition broken, whether the default be prior or subsequent to the assignment: *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521.

BURKHALTER v. PERRY & BROWN.

[127 Ga. 438, 56 S. E. 631.]

BILLS AND NOTES—Note Under Seal.—To render a note a sealed instrument, it must be so recited in the body of the note, and the mere addition of a seal or a device, "L. S.," after the signature of the maker is insufficient. (p. 346.)

PRINCIPAL AND AGENT—Note Signed by Agent Alone.—If an agent signs a note with his own name alone, and there is nothing on its face to show that he is acting as agent, he is, and his principal is not, personally, liable on the note. (p. 346.)

PRINCIPAL AND AGENT—Note by Agent as "Agent."—If an agent makes a note in his own name, and adds to his signature the word "agent," and there is nothing in the note to indicate who is the principal, the agent is personally liable, just as if the word "agent" was not added. (p. 346.)

PRINCIPAL AND AGENT—Note by Agent—Liability of Principal.—If it appears from the face of a note that credit is not given to the agent who signs it, and the name of the principal is disclosed at the time of the transaction, though not stated in the paper, and the act is within the power of the agent, the principal is bound. (p. 346.)

PRINCIPAL AND AGENT—Note by Agent—Parol Evidence to Charge Principal.—If a negotiable instrument is executed by an agent without sufficiently indicating on its face who the principal is, parol evidence cannot be introduced to charge the principal, although the agent in executing the instrument added the word "agent" to his signature. (p. 347.)

PRINCIPAL AND AGENT—Note by Agent—Parol Evidence to Charge Principal.—As between the immediate parties to a bill or note, it may be shown by parol that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, though signed by him alone, and that it was given and accepted as such. (p. 347.)

PRINCIPAL AND AGENT—Note Signed by Agent as "Agent"—Pleading.—In a suit by the payee against the principal on a note signed by "B, agent," a petition alleging that such agent was duly authorized to sign the note for his principal, and that it was intended to charge such principal by the signature of the agent as "agent," states a good cause of action. (p. 348.)

Shipp & Sheppard, for the plaintiff in error.

J. A. Hixon, for the defendant in error.

⁴³⁸ EVANS, J. Perry & Brown brought suit against Mose Walters, Ed. Walters, and Mrs. Lula H. Burkhalter, alleging that the defendants were indebted to plaintiff in the sum of one hundred and eighty-two dollars and ninety-seven cents as principal, besides interest and attorney's fees, on a certain promissory note, dated May ⁴³⁹ 3, 1902, and due September 1st after date, for two hundred and twenty-five dollars, signed by Mose and Ed. Walters and D. C. N. Burkhalter, agent, a copy of which is as follows:

"225.00

Americus, Ga., May 3rd, 1902.

"On or before the first day of September next, we promise to pay Perry & Brown, or bearer, two hundred and twenty-five dollars, with interest at 8 per cent. per annum from date of maturity, and ten per cent. on the amount for attys.' fees in case of suit; and we hereby severally waive and renounce for ourselves and families any and all homestead and exemption rights we may have under and by virtue of the constitution or laws of the State of Georgia, or the United States, in said property as against this contract. For value received. The consideration of this note is money, supplies, stock and other articles whatever of necessity to aid me in making and gathering my crops for the year 1902.

[Signed] "MOSE WALTERS (L. S.),
"ED. WALTERS (L. S.),

"O. D. OLIVER, N. P. S. S. Ga.

"D. C. N. BURKHALTER, Agent (L. S.)."

It was further alleged "that the said D. C. N. Burkhalter, agent, whose signature is attached to said note hereby sued upon, was the agent of Mrs. Lula H. Burkhalter, and has authority to bind her by such agency in the signing of said note; that the consideration of said note sued on was obtained in the prosecution and management" of her business "and within the scope of said agent to make and bind her by." By an amendment offered to meet a demurrer of the defendant Mrs. Burkhalter, it was averred that the note was given "on the date aforesaid and signed by the said parties aforesaid to cover a running account with plaintiffs, which account was to enable the tenants of Mrs. Lula H. Burkhalter to make a crop on her farm in Sumter county for the year 1902, and that said goods were sold solely on the strength of the credit of said Mrs. Lula H. Burkhalter, and credit was extended only to her; that D. C. N. Burkhalter was her agent, and had

authority in writing to bind her for said purpose, and had had since the year 1889, and bought said goods for said purpose in said manner, and at the time and prior thereto he had full authority and power from his wife to purchase supplies for her estate, to manage the same, to borrow money on her account, and execute notes for the same," and that he, "as agent for his said wife, ⁴⁴⁰ was in the habit of expressing his agency for his said wife, as was done in signing the note sued on, by simply adding 'agent' after his name, and in this way universally expressed his representative character; and the petitioner in this way always acknowledged him in said representative character, and did so in this instance." It is also set out that credit was extended to Mrs. Burkhalter "by and through her agent, D. C. N. Burkhalter, and that he had been running his wife's said farm for a number of years past in this manner, and petitioners furnished said hands as aforesaid, solely on the faith and credit of Mrs. Lula H. Burkhalter, knowing and realizing that the said D. C. N. Burkhalter had authority to bind her for such matters, and that he was her agent with this special authority to bind her, both on open account and by note." An itemized statement of the account was set out, headed "Mose & Ed. Walters & D. C. N. Burkhalter, agt. for his wife, Mrs. L. H. Burkhalter, bought of Perry & Brown." Certain other items of indebtedness for the year 1902 were also set out, which had been paid, and the prayer was "for judgment for the balance in the sum shown to be due and for judgment on said note sued on." This amendment was allowed, over the objection of the defendant Mrs. Burkhalter, that it set up a new cause of action; and she renewed her demurrer to the petition as amended, on the grounds that the note sued on was not her obligation, but the individual undertaking of D. C. N. Burkhalter, and that the terms of the note could not be varied by parol evidence to establish her liability. To the allowance of the amendment and the overruling of the demurrers, she filed exceptions pendente lite. Mrs. Burkhalter filed a plea of non est factum, and also denied the indebtedness and her husband's agency, and by amendment set up that she was a married woman when the paper was executed and could not become a surety. The plaintiffs introduced evidence to sustain the allegations in the petition. At the conclusion of the plaintiffs' evidence, Mrs. Burkhalter moved for a nonsuit, which motion was overruled; and no evidence being offered by the

defendants, the judge directed a verdict for the plaintiffs. Mrs. Burkhalter filed her motion for a new trial, complaining of the refusal to nonsuit the plaintiffs, and of the direction of a verdict against the defendants. The bill of exceptions assigns error upon the overruling of the motion for a new trial, and also upon the pendente lite exceptions ⁴⁴¹ to the allowance of the amendment and the overruling of her demurrers.

The note which is the basis of the plaintiffs' suit is not a contract under seal. While after each signature there is the device "(L. S.)," still there is no recital in the face of the instrument that it is to be under seal. In order to render a promissory note a sealed instrument, it must be so recited in the body of the note; the mere addition of a seal, or a device "(L. S.)," after the signature of the maker is insufficient: *Jackson v. Augusta Southern R. Co.*, 125 Ga. 801, 54 S. E. 697. For the present we will not stop to inquire whether the instrument sued on loses its otherwise negotiable character on account of the recital therein that its consideration is for supplies to be furnished in futuro. Indeed, under the view that we take of this case, it is unnecessary to determine whether the instrument is a negotiable promissory note, or merely a simple contract to pay money.

The general rule of law is that if an agent sign a note with his own name alone, and there is nothing on the face of the note to show that he is acting as agent, he will be personally liable on the note, and the principal will not be liable. If an agent make a note in his own name, and add to his signature the word "agent," and there is nothing in the note to indicate who is the principal, the agent will be personally liable, just as if the word "agent" was not added: *Graham v. Campbell*, 56 Ga. 258. If the suit had been against D. C. N. Burkhalter, he would not have been permitted to shift his responsibility by showing that the note was not in fact his own note, but that of the principal. The addition of the word "agent" was simply *descriptio personae*, and the note would be his individual obligation. Another and entirely different question is presented when the suit is against the principal, and the declaration contains appropriate allegations that the note sued on was the note of the principal, signed by his duly constituted agent, with intent thereby to charge the principal: See *Crusselle v. Chastain*, 76 Ga. 840. Where it appears from the face of the paper that the credit is not

given to the agent, and the name of the principal is disclosed at the time of the transaction, though not stated in the paper, and the act is within the powers of the agent, ⁴⁴² the principal is bound. It matters not whether the agent may also be bound, for there are cases where both principal and agent may be bound: *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665. The rule seems to be general that under appropriate pleading, where a contract in writing not under seal, and other than a negotiable instrument, is made in another name than that of the real principal, the real principal can sue and be sued: *Beckham v. Drake*, 11 Mees. & W. 315. It may possibly require some subtlety and refinement of reasoning to take this principle out of the operation of the rule that a written instrument cannot be added to, varied, or explained by parol. However, the distinction is firmly established in our jurisprudence, and is in the interest of fair dealing, that the real party to the contract, though his name may not appear therein, in the adjustment of disputes arising out of that contract between the contracting parties, should be allowed both to sue and be sued: *Metcalf v. Williams*, 104 U. S. 93, 23 L. ed. 665. This is especially true where the word "agent," "trustee," or "general manager" appears after the signature of a party to the contract. "A contract signed by a person who adds after his signature the words 'general manager' is not the individual undertaking of the person signing, if, . . . in a suit for its breach, this fact appears by extrinsic evidence": *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008.

A well-recognized exception to the general rule stated springs from the law-merchant. Where a negotiable instrument is executed by an agent without sufficiently indicating on its face who the principal is, parol evidence cannot be introduced to charge the principal, although he executed the instrument as agent and added the word "agent" to his signature. This exception to the rule is based upon the reason that "each party who takes a negotiable instrument makes his contract with the parties who appear on its face to be bound for its payment. It is a 'courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal thereto, unless his name in some way is disclosed upon the instrument itself": 1 Clark & Skyles on Agency, sec. 328a; 1 Daniel on Negotiable Instruments, sec.

303. But this exception in favor of negotiable instruments itself contains an exception; and that is, as between the immediate parties to a bill or note, it may be shown ⁴⁴³ by parol that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, and that it was given and accepted as such: *Metcalf v. Williams*, 104 U. S. 93, 23 L. ed. 665; *Mechem on Agency*, sec. 443. The reasoning in *Bedell v. Scarlett*, 75 Ga. 56, at first blush, would seem to militate with this view. In that case the plaintiff sued Bedell as maker of a bill of exchange signed "J. K. Bedell, Ag't." The maker pleaded that the draft was given in payment for timber purchased by the maker as the agent of the drawees, and that he had no interest in the timber; and that these facts were well known to the plaintiff when he purchased the draft. The question before the court was whether the facts alleged in this special defense were sufficient to discharge the actual signer (the agent) from liability. Parol evidence to sustain this plea was excluded by the trial judge, and on a review of the case this court affirmed that ruling. The agent could not shift his liability to his principal by proving these facts, according to the rule stated in *Graham v. Campbell*, 56 Ga. 258. This decision must be interpreted in the light of the question before the court. The distinction between that case and the one at hand is that in the former the suit was against the maker, who signed his name as "agent," and who was trying to evade liability by an attempt to show that the contract was not his, but that of his principal; while in the present case the principal is sought to be made liable on her contract, entered into by her duly authorized agent. We stated in the beginning that it was unnecessary to decide whether the note sued on was a negotiable instrument or a plain contract in writing. The present controversy is between the original parties to the instrument, and clearly comes within the exception to the rule above stated as applicable to negotiable instruments.

The pleader in the original suit declared on the note as being the contract of Mrs. Burkhalter, alleging that it was executed by her because it was signed by her husband as her agent, intending thereby to make her alone responsible. The amendment amplified the allegations of the petition respecting her liability, and did not introduce a new cause of action. We think that the petition as amended contained a cause of

action against Mrs. Burkhalter, and upon proof thereof that she would be liable on the note ⁴⁴⁴ signed by her husband as "agent": *Moore v. McClure*, 8 Hun, 557.

It may be contended that even if a principal may be liable on a note signed by the agent, with the word "agent" after his signature, with proper allegations that the contract thus signed was the contract of the principal, and that the signature in this manner was intended by both parties to be the signature of the principal, the rule would be inapplicable where there were other persons jointly bound on the same note, who are sued as joint obligors. Unquestionably the joint obligors might object to an amendment of this character. They have a right to rely on the legal import and effect of the instrument as signed by them. Relatively to them, the addition of the word "agent" to the signature of Burkhalter was mere *descriptio personae*, and they could insist that they had the right to hold him liable to contribution in the event they paid the debt, and that the plaintiff could not substitute another as being jointly liable with them under the contract over their protest. This objection, however, is personal to the joint obligors. It is no concern of Mrs. Burkhalter. She is not hurt by treating the contract as hers, simply because other persons may be jointly liable with her thereon. The fact that there may be others from whom she might demand contribution is to her advantage, and not to her detriment.

The evidence submitted by the plaintiffs fully sustained the allegations of their petition. Mrs. Burkhalter's liability was shown to be primary, and not as security. As she offered no testimony, and there was no conflict in the evidence submitted by the plaintiffs, there was no error in directing a verdict for the plaintiffs.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

Where a Person Signs a Contract, affixing to his name the word "agent," "trustee," or the like, he is *prima facie* individually liable: *Peterson v. Homan*, 44 Minn. 166, 20 Am. St. Rep. 564; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193. If a note is signed by an individual maker with such words as "president," "manager," or "secretary," immediately following the name, they are, in the absence of a corporate seal, or an apparent intention in the body of the instrument to bind the corporation alone, considered as merely descriptive of the maker, and the note must be held the obligation of the person who signs it: *Prescott v. Hixon*, 22 Ind. App. 139.

BLUTHENTHAL v. BENNEFIELD.

[127 Ga. 444, 56 S. E. 517.]

LIEN FOR LABOR—Laborer, Who is.—A person employed in a store, whose duties require him to attend the bar, wash bottles and glasses, sweep out and dust the store, unpack goods, keep the books, and do anything else that is required of him, is a laborer, and entitled to a laborer's lien upon the property of his employer. (p. 351.)

Lane & Maynard, for the plaintiffs.

445 **BECK, J.** Bluthenthal & Bickart foreclosed a mortgage against Melton, and caused the fieri facias to be levied on a stock of whiskies, wines, etc., belonging to the defendant, and under the foreclosure proceedings the property was sold. On a rule brought by the plaintiffs to distribute the funds in the hands of the sheriff, Bennefield intervened and prayed that he might recover one hundred and thirty-six dollars and forty-three cents, for which amount he had foreclosed a laborer's lien against Melton. The jury found in favor of the laborer's lien as claimed by Bennefield, and a judgment was entered accordingly. Bluthenthal & Bickart made a motion for a new trial, which was overruled, and they excepted.

We agree with counsel for plaintiff in error, in the statement made in their brief, that there are only two questions involved in this case: 1. Was Bennefield such a laborer as would entitle him to a lien? 2. Did Melton reside in Sumter county at the time of the foreclosure of the lien of Bennefield? The trial judge who passed upon the issues in the case, by his finding in favor of the intervener, answered both questions in the affirmative. And in reviewing his judgment, we have only to determine whether there was sufficient evidence to authorize the finding as made. Bennefield, the intervener, in his own behalf testified in part as follows: "During the time I was working for him [Melton] it was my duty to open the store every morning during the week at 5 o'clock, and the first thing I did after opening the store was to sweep the floors, dust and clean up the house; and all along during each day I was engaged in washing counters, washing glasses, pouring out drinks for the trade, selling and delivering over the counter whiskies and wines in bottles to the trade, dusting and keeping the shelves clean, receiving into the house shipments of goods, unpacking such shipments and placing the goods upon the shelving, placing beer in bottles on ice, tapping and drawing beer out of kegs, lifting barrels of whisky

onto the scaffolding, drawing whisky out of them ⁴⁴⁶ into bottles and placing the same on the shelves to be sold, and doing any and every kind of work that came to hand in business of that kind. I built the scaffolding on which to place the whisky barrels, and also erected myself the fixtures in the bar, except the front screen. Nearly all the work I did was manual labor." He further testified that in Melton's absence he handled the cash, and deposited it as directed by him, and paid out money only when Melton directed him to do so, that he gave checks in Melton's absence, but it was only done under express directions of the latter; that he did not have charge of Melton's business nor cash, except at times when he was absent, and then under special directions. When Melton was away he kept the books, "but he had no books to keep that amounted to anything; he did a cash business, and very little books were kept. . . . Mr. J. W. Mize also worked in the barroom about three months during the time I was working there, but he did nothing but serve drinks to the trade, and I had nothing to do with employing or paying him. I was not over him. But when Mr. Melton was away I was in charge of and managed his business." Here, under a number of decisions of this court, there was sufficient evidence to support a finding that the person who performed the duties as set forth above was entitled to a laborer's lien. Justice Lewis, in the opinion delivered by him in the case of *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726, says: "It appeared from the evidence that the duties of the plaintiff required him to attend the bar, wash bottles, sweep out the barroom, unpack goods, keep the books, and do anything else that was required of him. The performance of these duties would clearly entitle him to a laborer's lien; and the fact that, in addition to his manual labor, he was required to keep books, would not defeat his right to foreclose his lien as a laborer: *Oliver v. Boehm*, 63 Ga. 172."

The judge's finding that at the time of the foreclosure of the laborer's lien against him Melton was a resident of Sumter county rests upon sufficient evidence. There was no question that he had, previously to the closing of his business in that county, been a resident thereof, and while the trial judge might have been authorized to find that he had changed his domicile, the evidence did not require such a conclusion.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

The Question as to Who is a "Laborer" within the meaning of that term as used in exemption statutes is discussed in the notes to Oliver v. Macon Hardware Co., 58 Am. St. Rep. 303; Tabb v. Mallett, 102 Am. St. Rep. 81.

DAVIS v. ALBRITTON.

[127 Ga. 517, 56 S. E. 514.]

WILLS—Probate of—Relief from for Fraud.—A judgment admitting a copy of a lost will to probate, and obtained by false and fraudulent misrepresentations as to jurisdictional facts may be set aside in a proper proceeding instituted for that purpose by an heir of the testator, in the court rendering such judgment. (p. 354.)

JUDGMENTS—Fraud in Obtaining Relief from.—A judgment which is the result of a fraud perpetrated upon the court by a false representation of jurisdictional facts may be set aside in the same court rendering it, in a proper proceeding instituted therein for that purpose. (pp. 354, 355.)

Ellis, Wimbish & Ellis, for the plaintiff.

W. McElreath, for the defendant.

517 BECK, J. Mrs Davis, an heir at law of one Carrie May, deceased, filed her petition against Mrs. Albritton to the May term, 1905, of the court of ordinary of Fulton county, in which she sought to have set aside a judgment, rendered by that court at the February term, 1905, establishing a copy of the will of the said Carrie May, and admitting the same to probate in solemn form. She sought to have the judgment set aside on the grounds: (1) that the court rendering it was without jurisdiction of the person or property of the deceased, and it was therefore void; (2) that plaintiff was not legally served with notice of the proceedings to probate said will; and (3) fraud in the procurement of the judgment. The defendant was served with a copy of the petition and rule nisi, and filed her answer thereto. At the trial of the case, on appeal to the superior court, it appeared from the evidence introduced by the plaintiff that the testator, at the time of her death, was a resident of Pawtucket, Rhode Island, and that she left no property of any kind within the limits of Fulton county, Georgia. The court ruled that these questions were concluded by the judgment of the court of ordinary admitting the will to probate, and directed a verdict for the defendant. The plaintiff excepted.

1. The general rule of law unquestionably is, that when a court of competent jurisdiction has rendered a judgment in relation to any subject matter within its jurisdiction, the presumption arises ⁵¹⁸ that it had before it sufficient evidence to authorize it to award such judgment; and said judgment will be conclusive as to the subject matter which it purports to decide. But to this general rule there are acknowledged limitations, growing out of circumstances. In the case of *Boyd v. Glass*, 34 Ga. 253, 84 Am. Dec. 252, it was said: "If a court have jurisdiction of a question, and acts upon it, that action, until set aside, is conclusive. But the question of jurisdiction is always open to investigation, and if upon such investigation it be found that the court had no jurisdiction of the person or subject matter, then all proceedings had are nullities." And to the same effect is the case of *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897, where it was said: "Want of jurisdiction may be shown either as to the subject matter or the person, or, in proceedings in rem, as to the thing": See, also, *McCauley v. Hargroves*, 48 Ga. 50, 15 Am. Rep. 660. And it has been repeatedly held that a judgment may be set aside, upon a proper case made, by a decree in chancery, or by a proceeding at law, by petition with rule nisi or process, and service upon the necessary parties, instituted for that purpose in the court in which the judgment was rendered: Civ. Code, sec. 3987; *Duer v. Thweatt*, 39 Ga. 578, and cases there cited; *Dugan v. McGlann*, 60 Ga. 353; *Tant v. Wigfall*, 65 Ga. 412; *Turner v. Jordan*, 67 Ga. 604; *Union Compress Co. v. Leffler*, 122 Ga. 640, 50 S. E. 483. It appears from the report in the case of *Stewart v. Golden*, 98 Ga. 479, 25 S. E. 528, that the defendant Golden, in order to resist an action of complaint for land, applied to the court of ordinary to set aside the judgment of that court, rendered at a previous term, appointing one Underwood administrator on the estate of Harris, deceased (the validity of a deed from Underwood, as administrator, under which the plaintiff was seeking to recover the lands, being dependent upon the validity of the judgment appointing said Underwood administrator). The ground alleged by defendant Golden for setting aside said judgment was that the court of ordinary of Meriwether county had no jurisdiction to appoint Underwood administrator on the estate of Harris; for the reason that Harris did not reside in that county at the time of his death, had no property there at the time of his death,

and had no bona fide cause of action against anybody residing there. A rule nisi was issued by the ordinary, calling on the plaintiff to show cause why the judgment appointing Underwood administrator should not be set aside, and this rule and a copy of ⁵¹⁹ the petition were served upon the other party, and at a succeeding term of the court of ordinary the judgment appointing Underwood as administrator was set aside and declared void ab initio, on the ground that the court rendering the same had no jurisdiction, for the reasons above stated. This last judgment of the court was attacked, and Chief Justice Simmons, who delivered the opinion, said: "If the facts pleaded by them [the plaintiffs in the petition to set aside the former judgment] were true, there could be no question that the judgment [appointing Underwood administrator] was void; and 'a void judgment is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it': Code, sec. 3594. 'A judgment that is void may be attacked in any court, and by anybody': Code, sec. 3828. We do not see, therefore, why the defendants did not have a right to go into the court that rendered the judgment and have it set aside." In the case of *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134, it was held that where the want of jurisdiction appears on the face of the record, the judgment may be collaterally attacked, and treated as a mere nullity; but where it does not so appear, it can only be attacked directly in a proceeding instituted for that purpose.

It is distinctly alleged in plaintiff's petition that the deceased was not, at the time of her death, a resident of Fulton county (the jurisdictional fact recited in the order admitting the said will to probate), but was a resident of the state of Rhode Island, and left no property of any kind in said county of Fulton; that the defendant "knew that the said . . . deceased was not domiciled in Fulton county, Georgia, at the time of her death, but was a resident of the state of Rhode Island," and at the time said will was offered for probate there was no property of the deceased within the limits of Fulton county; and that the efforts of said defendant to obtain said judgment "amounted to a scheme and device in the nature of a legal fraud upon the honorable ordinary's court of Fulton county." If these allegations be true, the court of ordinary of Fulton county not only had no jurisdiction to render said judgment (Civ. Code, sec. 3279), but the rendition of

the same was the result of a fraud perpetrated upon that court by a false representation that the deceased was a resident of Fulton county at the time of her death (*Louisville & Nashville R. Co. v. Chaffin*, 84 Ga. 519, 11 S. E. 891); and a court of equity would have jurisdiction to set aside said judgment on the ⁵²⁰ ground of fraud in obtaining the same: *Wallace v. Walker*, 37 Ga. 265, 92 Am. Dec. 70; *Langmade v. Hamilton*, 89 Ga. 441, 15 S. E. 535; *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134. Was plaintiff entitled to have it set aside in the same court that rendered it? The question was answered in *Stewart v. Golden*, 98 Ga. 479, 25 S. E. 528. If, as alleged and sought to be proved, a fraud was perpetrated by knowingly and falsely pretending that the decedent resided in Fulton County, the fact that citation was published would not prevent the plaintiff, who had no knowledge of the proceeding, from moving in due time, in the court where the judgment was rendered, to have it set aside.

2. Evidence having been introduced by the plaintiff which would authorize a jury to find a verdict in her favor the court erred in directing a verdict for the defendant.

Judgment reversed.

All the justices concur, except Fish, C. J., absent.

Relief from the Orders and Decrees of Probate Courts is sometimes granted in equity: See the note to *Froebrich v. Lane*, 106 Am. St. Rep. 639; *Nelson v. Cowling*, 77 Ark. 351, 113 Am. St. Rep. 155. It is well understood that a judgment without jurisdiction is void, and may be denied or contested in any proceeding, direct or collateral: *Thornily v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959. The vacation of judgments on motion when not specially provided for by statute is considered in the note to *Furman v. Furman*, 60 Am. St. Rep. 633. The power of a court to vacate a judgment after the time specified in the statute for granting relief therefrom is considered in the note to *Nicklin v. Robertson*, 52 Am. St. Rep. 795. And relief in equity other than by appellate proceedings from judgments and decrees is considered in the note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218.

The Probate of Lost or Destroyed Wills is discussed in the note to *Williams v. Miles*, 110 Am. St. Rep. 445.

SOUTHERN FLOUR AND GRAIN COMPANY v. NORTHERN PACIFIC RAILWAY COMPANY.

[127 Ga. 626, 56 S. E. 742.]

RAILROADS—Attachment of Car from Another State—Contract Right Superior to.—If a railroad company in one state receives a car from a company in another state under a contract of hiring, giving the former company the right to carry the car to its destination within the state, unload it, and then reload it, and return it in the same general direction to the owner beyond the limits of the state, the right of the hiring company to the use of the car is superior to the right of an attaching creditor of the owner, who seeks to subject the car to attachment, by service of summons or garnishment upon the hiring company. (p. 358.)

RAILROADS—Attachment of Car from Another State—Interstate Commerce.—If a railroad company in one state receives a car from a company in another state under a contract of hiring, giving the former company the right to carry the car to its destination within the state, unload it, and then reload it, and return it in the same general direction to the owner, beyond the limits of the state, such car, while in the state, is not exempt from attachment for a debt of the owner, sought to be executed by service of summons or garnishment upon the hiring company, upon the sole ground that such impounding of the car is an unlawful interference with interstate commerce. (p. 361.)

RAILROADS—Attachment of Cars—Interstate Commerce.—An unloaded car generally employed by a railroad company as part of its equipment in the transportation of freight from one state to another, is not exempt from the process of attachment regularly instituted for the collection of a debt, upon the ground that such impounding of the car is unlawful interference with interstate commerce. (p. 362.)

W. McElreath and W. H. Terrill, for the plaintiff.

Tye & Bryan, for the defendant.

626 ATKINSON, J. 1. The only contention made before us by counsel for plaintiff in error is that a certain railroad car, the property of the Northern Pacific Railway Company, the defendant in attachment, which came into the hands of the garnishee, the Western and Atlantic Railroad Company, within the jurisdiction of the court, after the execution of the attachment by service of the summons of garnishment and before the garnishee filed its answer to the summons of garnishment, is subject to the attachment. The garnishee **627** insisted that the car was not subject to attachment, and set forth in its answer to the summons the facts upon which it contended that the property was not subject. There being no traverse to the answer of the garnishee, the court, upon motion and consideration, discharged the garnishee and

dismissed the attachment. The plaintiff in error was the plaintiff in the court below, and excepted to the ruling of the court. The answer of the garnishee in effect sets up two theories under which it was insisted that the court should not require the garnishee to surrender the possession of the car, to wit: (a) That the garnishee had a right to the use of the car superior to the right of the garnishing creditor; (b) that the car being employed in interstate commerce, it would be a violation of the federal constitution and statute upon the subject of interference with interstate commerce to require the surrender of the car. If the judgment was right upon either theory, it would be our duty to affirm it. As we shall affirm the judgment upon the first theory only, it is necessary that we should deal with that view of the case. In the brief for plaintiff in error no point is insisted upon except that the property was not relieved from the process of garnishment by force of the federal constitution and statute on the subject of interference with interstate commerce. Inasmuch as this theory of the case has been dealt with by counsel on both sides and a ruling thereon is desired, we will also deal with the last theory mentioned, but we will not consider any other proposition which the case may present, for the maintenance of which counsel in their briefs did not insist or contend.

We proceed now to deal with the case under the first theory. We may regard it as fundamental that the owner of property may, as against his creditors, sell, lease or otherwise dispose of the same, in whole or in part, so long as the transaction is in good faith and founded upon a valuable consideration. A purchaser or other person acquiring any interest in the property takes the same, under circumstances above referred to, freed from the claim of creditors who have no lien at the time that the owner makes the disposition of his property to him. A creditor who acquires a lien after such disposition by the debtor can, as a general rule, seize, under the process issued in enforcement of his lien, only such interest in the property as remains in his debtor, and cannot defeat or in any way interfere with the purchaser in the rights that he has acquired ⁶²⁸ prior to the acquisition of the lien. In the present case the answer of the garnishee alleged that "by virtue of an understanding existing and an agreement" between the garnishee and the defendant in attachment, a car of the defendant in attachment coming from a point without

the state into the possession of the garnishee loaded, upon being unloaded in this state, might be reloaded by the garnishee and used for the purpose of shipment, provided it was routed in such a way that the direction would carry it to the point whence it started; that is, the agreement alleged was, in effect, that the cars of the defendant in attachment should be used to haul freight to points along the line of the garnishee, and, when such cars were emptied, that the garnishee might use them for transporting its freight, provided that they should be loaded only with freight that had a destination in the direction from which the car originally came when received in their possession and returned to the owner at some point on its line of road out of this state. It was alleged that agreements of this kind were at the present day necessary and almost universal for the purpose of facilitating through shipments and preventing the necessity of unloading and reloading cars at connecting points; that without such right so to receive and return cars, its business as a common carrier would be seriously affected. The answer does not allege that this agreement was in writing, but the substance of it was set forth therein, and is in effect as above stated. There was no traverse to the answer. Neither was there any exception in the nature of a special demurrer to any of the averments, or other motion challenging the sufficiency of the answer. In the absence of such exceptions, the answer will be deemed as admittedly true, and as alleging a valid and binding agreement between the two companies of the character above indicated.

Under its agreement, the garnishee acquired a right to use each car of the defendant in attachment as it came into its possession under the circumstances referred to. This was not a mere naked right under the answer, but was based upon a consideration; for, under the arrangement between the companies, each one was to pay the other for the use which it made of the other's cars. We see no reason why such an agreement is not valid, and, if it is valid, under its terms the company receiving the car loaded acquires a special property therein—that is, present possession with ⁶²⁹ the right to use the car in the transaction of its business for certain purposes and during a limited time. This agreement antedates the service of the summons of garnishment, and, consequently, the lien of the attachment. It is a valuable right. The junior attaching creditor cannot, by mere levy, acquire any

lien which would defeat the right of use which the garnishee had in the car. If the owner of a horse makes an agreement with another by which the other is to have the use of him for a year, a creditor of the owner cannot defeat this arrangement by the levy of an attachment sued out after the agreement of hiring has become complete. Such would be the case if the hiring was for even a day. The right to the use of the thing hired for the term of the contract of hire is substantial, and cannot, without violence to the rights of the person hiring, be taken from him without his consent, either under authority of an after-acquired lien against the hirer or under authority of an after-acquired title obtained from the hirer. The car involved in controversy was no less than the subject matter of a contract for hire, and the garnishee's interest therein was superior to any after-acquired interest which could be asserted by means of the attachment proceeding. This principle is recognized in section 2913 of the Civil Code, which is in the following language: "A thing hired is not subject to sale under judgment obtained subsequent to the contract of hire against the owner, but may be levied on, and a bond for its forthcoming at the expiration of the time for which it is hired may be demanded of the person hiring: Provided, the time of hiring does not exceed one year." The word "levied" in that section is to be given its technical meaning—that is, an actual seizure of the property by a levying officer under a process—and therefore the latter part of the section in relation to a forthcoming bond would have no application in a case where the property is seized under a garnishment, which is for some purposes treated as in effect a levy upon the property; but it is not a technical levy within the meaning of the statute.

Under the record it appears that this contract of hire, or this right to the use of the car so vested in the garnishee by virtue of the contract, would not cease to exist until after the car had been returned to a point beyond the limits of this state. At that time the garnishee loses control of the car and it is beyond the jurisdiction of the court. The garnishee would neither have a contractual ⁶³⁰ right, nor the process of court, to bring the car back into the jurisdiction of the court. It is very clear that the fixed right of the garnishee to so use the car could not be denied by the defendant in attachment. Admitting the contract of hire to the garnishee, the defendant would not be heard to deny to the garnishee

the right of use according to the terms of the contract. If the defendant could not take the car before the contract of hire had terminated, by what authority would a junior lien creditor take it? The creditor could not take that which was not the defendant's. It may be safely said that at common law, if the defendant, the Northern Pacific Railway Company, could not take the car from the garnishee at any time while it was being sought to impress it with the lien of the attachment levied by service of the process of garnishment, the plaintiff, the Southern Flour and Grain Company, could not do so. This court said in *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S. E. 379: "By garnishment he may reach what is due his debtor, but is bound by existing, though unrecorded, counterclaims, setoffs, pledges, encumbrances or liens." In *Bates v. Forsyth*, 69 Ga. 365, it is said: "What one cannot recover himself cannot be recovered by garnishment against him." In *Tim v. Franklin*, 87 Ga. 93, 13 S. E. 259, it is said: "As a general rule, creditors cannot reach by garnishment any assets which the debtor himself could not recover from the garnishee." In *Drake on Attachment*, seventh edition, section 458, it is said: "A fundamental doctrine of garnishment is that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses. Where, therefore, the attachment plaintiff seeks to avail himself of the rights of the defendant against the garnishee, his recourse against the latter is limited by the extent of the garnishee's liability to the defendant": See, also, in this connection, 14 Am. & Eng. Ency. of Law, 2d ed., 793; 20 Cyc. 994; 1 Shinn on Attachment and Garnishment, secs. 28, 34, 41; 2 Shinn on Attachment and Garnishment, sec. 578; Waples on Attachment and Garnishment, 2d ed., secs. 255, 356; *Johnson v. Union Pac. R. Co.*, 145 Fed. 249. In view of what has been said, the garnishee had rights which not only the defendant, but also the plaintiff, the garnishing creditor, was bound to respect. Under the conditions already stated, the garnishee could not be required in a court of law, without equitable pleadings, to deliver the car to the officers of court in response to the summons of garnishment ⁶³¹ to be disposed of by order of the court. The rights of the parties in equity are not involved in this case. In the first place, there are no equitable pleadings upon which equitable relief could be granted to the attaching creditor; and in the second place,

the attachment was returned to the city court of Atlanta, a court with common-law jurisdiction, but without jurisdiction to grant affirmative equitable relief such as the plaintiff would require in order to subject to its attachment, upon equitable principles, the residuary interest of the defendant in the car. Under the pleadings the court did not, under this theory of the case, err by discharging the garnishee, nor in dismissing the attachment. The court's ruling upon this theory of the case being well founded, the judgment of discharge and dismissal will be affirmed.

2. We may now consider whether the attempt upon the part of the garnishing creditor to take this car by means of the garnishment process is violative of the federal constitution and statutes upon the subject of interfering with interstate commerce. The car came into this state under circumstances which are sufficiently stated in the foregoing division of this opinion. It was a vehicle of transportation which brought from another state a load of wheat consigned to a point in this state. There was no attempt to serve the attachment by direct seizure of the car so as to interrupt the due transmission of the freight, but the execution of the attachment was attempted by service of the summons of garnishment. While the garnishment might ultimately impound the car, the service of the writ was perfectly consistent with the right of the garnishee to continue its use to the point of destination, and there to discharge the freight. This being true, it may be regarded as a matter of fact that the levy of the attachment by service of the summons of garnishment did not in any manner interrupt the transportation or delivery of the freight. A mere statement of the facts renders it manifest that, as affects either the freight which the car brought into the state, or the business of transporting the same, there was no interference whatever; and it follows, of course, that if there was nothing further involved, the car would not be exempt upon the theory of unlawfully interfering with interstate commerce.

It is insisted further, however, that the car is a part of the equipment of a railroad company employed generally in the hauling of ⁶³² interstate and intrastate freight, and employed at this particular time only for the purpose of bringing from a point without this state a load of wheat to be discharged within this state, with the possibility of being reloaded with freight destined to points either in this state or

beyond the limits of this state, and, after being so loaded, returned in the direction from which it had come. It is readily seen that there is a time while in this state that the car becomes empty, and, returning, may or may not be employed in the business of transportation. The fact of present transportation of freight, is, therefore, eliminated. The question finally is resolved into this: Is an unloaded car, which is generally employed by a steam railroad company as a part of its equipment in the transportation of freight from one state into another, exempt from the process of attachment regularly instituted for the collection of a debt? Such is the case before us, and we proceed to deal with the law applicable to such facts. The attachment laws with which we are dealing are not in conflict with the state constitution, and there is no attack made upon their validity. They may be regarded, therefore, as valid in all respects. There is no purpose of these attachment laws except the enforcement of the payment of debts. Such purpose is not only legitimate, but essential to the maintenance of the commercial and industrial welfare of the state. It is proposed in this instance to employ the writ of attachment only for this purpose. Rights of this kind may be enforced by any member of the public in any well-founded case. It may sometimes happen that the prosecution of such right for the legitimate purpose of collecting a debt may incidentally affect interstate commerce, but it does not follow that, merely because of such incidental effect, the courts will always enjoin the prosecution of the otherwise legitimate right. This principle has been recognized a number of times by the supreme court of the United States, though not in any case involving the collection of a debt. A case involving the application of the principle to the right of levy for the collection of a debt has not been before that court. The cases in which they have applied the principle are those involving occupation tax, public morals, public convenience, and health of people and animals, and similar cases: See *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. Rep. 128, 45 L. ed. 186; *Lake Shore & U. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. Rep. 465, 43 L. ed. 702; *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488, 42 L. ed. 878; *Hennington v. Georgia*, 163 U. S. ~~633~~ 299, 16 Sup. Ct. Rep. 1086, 41 L. ed. 166; *New York etc. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. Rep. 418, 41 L. ed. 853; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 18

Sup. Ct. Rep. 289, 42 L. ed. 688; *Richmond & A. R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. Rep. 335, 42 L. ed. 759, and authorities cited in each case. But, after all, the argument in each case leads to the conclusion that if the thing attempted is in pursuance of a valid state law, its enforcement will not be stayed only because it may incidentally affect interstate commerce. The principle is applicable to the case at bar, and the plaintiff should not be precluded from collecting his debt by impounding the car in the manner attempted, because of the incidental effect it may have on the general use of the car in the matter of transporting interstate freight. To hold otherwise would in effect be to render immune from the payment of debts all property of railroads employed in interstate traffic. Such a proposition does not rest upon sound reason. What we have said seems not to be in entire harmony with rulings made by some courts: See *Davis v. Cleveland R. Co.*, 146 Fed. 403; *Wall v. Norfolk & W. R. Co.*, 52 W. Va. 485, 94 Am. St. Rep. 948, 44 S. E. 294, 64 L. R. A. 501; *Connery v. Quincy O. & K. C. R.*, 92 Minn. 20, 104 Am. St. Rep. 659, 99 N. W. 365, 64 L. R. A. 624. But the rulings in those cases are not controlling, and we do not by force of their reasoning feel drawn to a conclusion different from that already stated. The decisions to which we have alluded as entertaining a contrary view are interestingly criticised in the *Harvard Law Review*, volume 20, No. 4, pages 319, 320. In view of what has been said, we hold that the answer of the garnishee did not allege such facts with respect to the car as to render it exempt under the second theory insisted upon.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

A Car of a Foreign Railroad Corporation, sent with freight into this state, and here remaining a reasonable time for reloading and sending back to the state from which it came, has been held not subject to an attachment issued in an action in the courts of this state: *Connery v. Quincy etc. R. R. Co.*, 92 Minn. 20, 104 Am. St. Rep. 659, and note.

ROGERS v. STATE.

[128 Ga. 67, 57 S. E. 277.]

HOMICIDE—Weakness of Mind.—It is not competent to prove in a prosecution for murder that the defendant was of weak mind, when it is admitted that he is neither an idiot nor an insane person. (p. 365.)

HOMICIDE—Instruction as to Cooling Time.—Where the judge in a murder trial gives, in his general instructions to the jury, the section of the Penal Code embodying the law of voluntary manslaughter, which contains the general principles of the law of "cooling time," his failure to give a more specific instruction on the question is not error, in the absence of a request therefor. (p. 366.)

HOMICIDE.—The Fact that a Woman is Unchaste does not justify her husband in slaying her, nor, in the absence of a sudden heat of passion resulting from adequate cause, reduce the homicide below the grade of murder. (p. 367.)

HOMICIDE—Reading Law to Jury.—The trial court is vested with a discretion to prevent counsel from reading to the jury a decision of the supreme court which is not applicable to the case on trial. (p. 367.)

Twiggs & Oliver, Gordon Saussy, C. E. Donnelly and T. L. Hill, for the plaintiff in error.

John C. Hart, attorney general, and W. W. Osborne, solicitor general, for the defendant in error.

⁶⁷ BECK, J. Rogers was indicted for the murder of his wife. The evidence for the state showed that she entered the store of one Andepa to purchase some fish, and, while she was waiting for her purchase, the defendant entered the store and immediately began firing at her, two shots taking effect, one in the breast and one in the back. She fell on the floor and expired. Thereupon the defendant shot himself, inflicting a flesh wound in the arm and breast. In his statement to the jury he said: "The woman [deceased] worried and aggravated me in every way. . . . She would take money from me and go down to Frogtown and spend it among dagoes. . . . She would go around bad places visiting people that was not right. . . . I told her about the company she kept, and told her it was not right, and she cursed me." He gave the following account of the tragedy: "I left [home] and went to Shuman's place, up the street, and stayed there, I guess, about forty-five minutes or one hour, and Shuman

told me she was there looking for me, and I told him when I started home that I had better go and shun her. When I left Shuman's place I left with the intention of going home—never thought she was in a place like that, among negroes and dagoes. She was standing by the door in this place, and as I ⁶⁸ walked in she had the children in her left arm, up against the counter, and as I walked in she reached her hand down in her apron pocket, and after that I can't remember much about it." Witnesses for the defendant testified that they had heard the deceased curse and threaten the defendant, and had seen her pursue him with a knife, shortly before the killing, but none of the defendant's witnesses testified as to the circumstances of the shooting. The jury found the defendant guilty of murder, the court overruled his motion for a new trial, and he excepted.

1. Upon the trial of this case the defendant's counsel sought to introduce evidence to the effect that the defendant, from the time of his childhood, had been of feeble intellect and weak intelligence; his counsel stating to the court, however, that it was not contended upon the part of the defense that the defendant was either an idiot or an insane person, or that he labored, at the time of the homicide, under any form of delusional insanity. Upon motion of counsel for the state, the court repelled the testimony, and properly so, we think. The court could not have admitted it without either disregarding or violating a well-established rule controlling the admission of evidence of the character indicated. In *Studstill v. State*, 7 Ga. 2, the court held that it was not competent to prove that the defendant was of weak mind, where it was admitted that he was neither an idiot, nor a lunatic, nor an insane person. The standard of responsibility upon the part of one charged with the commission of a criminal act has been fixed by law. "A person shall be considered of sound mind who is neither an idiot, a lunatic, nor afflicted by insanity, or who has arrived at the age of fourteen years, or before that age if such person know the distinction between good and evil": Pen. Code, sec. 33; *Loyd v. State*, 45 Ga. 57; *Taylor v. State*, 105 Ga. 746, 31 S. E. 764. The standard fixed by law, whether the defense be insanity, or weakness of mind amounting to insanity, or idiocy, is thus laid down in *Roberts v. State*, 3 Ga. 310: "If a man has reason sufficient to distinguish between right and wrong in re-

lation to a particular act about to be committed, he is criminally responsible. An exception to this rule, however, ⁶⁹ is where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet in consequence of some delusion the will is overmastered and there is no criminal intent. Provided that the act itself is connected with the particular delusion under which the prisoner is laboring." This doctrine has been uniformly adhered to by this court where similar questions were presented for decision: *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Carr v. State*, 96 Ga. 284, 22 S. E. 870; *Flanagan v. State*, 103 Ga. 619, 30 S. E. 550; *Taylor v. State*, 105 Ga. 746, 31 S. E. 764; *Minder v. State*, 113 Ga. 772, 39 S. E. 284. And the evidence being inadmissible, because, if accepted by the jury as true, it could not establish or tend to establish the nonresponsibility of the defendant for his criminal act, it should have been rejected. That the jury might have been inclined to consider such evidence in fixing the punishment, after having found the defendant guilty, afforded no reason why this incompetent testimony should have been introduced for their consideration. While juries must remain unrestrained in the exercise of their discretion in the matter of the recommendation of the punishment by death or by life imprisonment in the penitentiary, where the accused is convicted of a capital offense, this fact should in no way affect the court in its rulings upon evidence which is immaterial or irrelevant so far as the issues upon trial are concerned.

2. One ground of the motion is based upon the fact that the court failed to charge the jury "upon the law of cooling time." No request to charge upon this subject was preferred by counsel for defendant. The judge, in his general instructions to the jury, gave the section of the Penal Code embodying the law of voluntary manslaughter (section 65). This section contains the broad, general principle of the law of "cooling time," and even if the facts authorized a more specific instruction upon that question, the failure to give it, in the absence of a written request, was not error.

3. As a part of his instructions to the jury, the court charged as follows: "If you find that the wife was unchaste, or otherwise a bad woman, that would not of itself amount to a legal justification of the homicide, nor would it, in the absence of

a sudden heat of passion, resulting from adequate cause, be sufficient to reduce the homicide below the grade of murder." Error is assigned upon the giving of the above charge, upon the grounds: "(a) There was no evidence in the record to justify this charge, as all evidence of ⁷⁰ unchastity upon the part of the wife had been ruled out by the court. Therefore, there being no testimony to warrant such a charge, such charge was calculated to prejudice the jury; as they might naturally infer that this was the cause of the killing. (b) Because even if there had been any such evidence, it was error for the court to inform the jury that such evidence would not be sufficient in law to reduce the homicide below the grade of murder." Reference to the defendant's statement to the jury, as it appears in the record, will show that the first criticism is without merit, as the defendant, throughout that statement, insists that his wife had been guilty of such conduct as to satisfy him that she was unchaste, and a woman of bad character. And a sufficient reply to the second criticism of the charge is that, even if the defendant's conclusions from what he had observed of his wife's conduct were correct, it did not justify him in taking her life, nor reduce the killing from the crime of murder to any lower degree of homicide. The principle of law embodied in the charge was sound, wholesome and well established: *Fry v. State*, 81 Ga. 645, 8 S. E. 308.

4. Counsel for the accused, during his argument, commenced reading to the jury a portion of the decision in the case of *Flanagan v. State*, 103 Ga. 619, 30 S. E. 550, and was stopped by the court; and it is insisted that the court committed error in holding that counsel could not read from that case to the jury. It does not seem to us, however, that in this ruling the court appears to have abused its discretion—no evidence whatever having been introduced to which the doctrine laid down in that case upon the subject of delusional insanity was in any way pertinent or applicable. While it is true that, under the practice in this state, counsel are allowed to argue to the jury the law as well as the facts, and should be allowed great latitude in the selection and presentation of those cases which in their judgment will assist the court and jury in a proper application of the law to the case as made by the evidence and the statement of the defendant, it is also true that the court exercises a discretion

in such matters which this court will not interfere with, where it is not abused. And this does not appear to have been done in the present instance.

Judgment affirmed.

Fish, C. J., absent.

The other justices concur.

Mere Weakness of Mind cannot be urged as a defense to crime: See the note to *Knights v. State*, 76 Am. St. Rep. 86.

PULLMAN COMPANY v. GREEN.

[128 Ga. 142, 57 S. E. 233.]

SLEEPING-CAR COMPANY—Loss of Passenger's Effects.—It is the duty of a sleeping-car company to exercise reasonable care to guard the personal effects which a passenger may reasonably be expected to carry with her on her journey, including articles of personal adornment and jewels; and if, through want of such care, these effects are stolen, the company is liable therefor. (p. 369.)

SLEEPING-CAR COMPANY—Loss of Passenger's Effects.—It cannot be said as a matter of law that a passenger who leaves in her berth articles of apparel or adornment during the time she is making her toilet in the morning is guilty of such contributory negligence as will defeat a recovery against the sleeping-car company for their loss. (p. 372.)

Joseph H. Hall and Dorsey, Brewster, Howell & Heyman, for the plaintiff in error.

Claud Estes, for the defendant in error.

142 COBB, P. J. The plaintiff sued the Pullman Company, alleging, in her petition, that the company operated what are known as sleeping-cars, and that she was a passenger on one of such cars operated by the company, having paid her fare for her berth and entertainment in the car from Baltimore, Maryland, to Macon, Georgia; that the company undertook, and were bound, to provide her with a berth, and to use reasonable care to see that the berth was properly guarded, and that her personal effects and baggage were protected from the time she became a passenger until she reached her destination; and that while she was such a passenger, through the negligence and the failure of the defendant in performing

the undertaking and duty above referred to, her handbag and its contents ¹⁴³ were stolen from her berth. The contents consisted of rings, eyeglasses, a watch, and other articles for personal adornment, and money; and the bag and its contents were of the aggregate value of sixteen hundred and seventy dollars. The rings, jewelry, etc., are described in the petition, and are alleged to be articles of personal adornment and utility, usually and ordinarily worn by the plaintiff, and which she had simply taken off for the night and placed in her handbag. It is alleged that on the morning of a named date, while she was still a passenger, she left her berth and went to the toilet-room to make her morning toilet, leaving the hand-bag and its contents in the berth, under the pillow, where they had been placed during the night; that after reaching the toilet-room it occurred to her that she had left her hand-bag and jewelry in her berth, and, before completing her toilet, she returned to the berth to get them, and found that the porter was making up the berth, and that the hand-bag and its contents had been stolen, or were missing; and she has never recovered any part of the same or been paid therefor. She lays damages in the amount above stated, and prays for a judgment. By amendment it was alleged that the defendant did not properly watch and guard the car so as to prevent the theft, and by failure to keep proper watch over the berth of the plaintiff, and the failure to properly guard and preserve her effects contained therein, they were stolen by some one unknown to her. The defendant filed a demurrer upon several grounds, but at the hearing abandoned all the grounds except the one setting up that the petition set forth no cause of action, and another, that the petition did not set forth with sufficient distinctness the particulars in which the agents of defendant were negligent, and what agents and employes were so negligent. The demurrer was overruled. The trial resulted in a verdict in favor of the plaintiff for the amount sued for. The defendant's motion for a new trial was overruled. It excepted to the overruling of its demurrer and to the refusal of a new trial.

¹⁴⁴ It is the duty of a sleeping-car company to exercise reasonable care to guard the personal property of the passenger from theft; and if, through the want of such care, his personal effects, or some of them, are stolen, the company would be liable for such of the stolen valuables as the passenger might reasonably be expected to carry with him on

his journey. This is the rule of liability as settled by the decisions of this court, and has been declared to be in accord with the weight of authority elsewhere: *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933, 9 L. R. A., N. S., 407. See also, *Pullman Palace Car Co. v. Martin*, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498; *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 S. E. 186; *Pullman Palace Car Co. v. Harvey*, 101 Ga. 733, 28 S. E. 989. In all of the cases cited, the loss occurred while the passenger was asleep. In *Pullman Palace Car Co. v. Hall*, 106 Ga. 765, 71 Am. St. Rep. 293, 32 S. E. 923, 44 L. R. A. 790, the loss occurred in the daytime and while the passenger was not asleep. That was a peculiar case. The baggage was stolen by a thief who was on the outside of the car, standing on a rod underneath the car, and reaching through the window and taking the valise from the seat. At that time the car was in motion, going at a rate of five or six miles an hour, through the railroad yard adjacent to a city; the rear door was securely locked, and the conductor and the porter were guarding the front door. Under these circumstances it was held by a majority of the court that the evidence did not authorize a finding that the company had been lacking in the exercise of reasonable care; that the occurrence was so unusual and peculiar that it could not have been reasonably foreseen and guarded against. Mr. Justice Lewis dissented, being of the opinion that the evidence was sufficient to sustain a verdict holding the company liable. The rule above referred to was recognized by all the justices, the only difference being as to its application to the peculiar facts of that case.

The liability of the company for a loss occurring during the night, when the passenger is asleep, has been rested upon the proposition that the company invites the passenger to sleep, and therefore owes him the duty of reasonable care to protect his personal effects while he is asleep. There is generally in such cars a toilet-room, which the company invites the passenger to use when ¹⁴⁵ he rises in the morning. When the invitation of the company is accepted, the duty to guard his personal effects left in his berth, while he is absent therefrom, is founded upon a similar reason to that which requires a guard to be maintained while he is asleep during the night. He cannot guard his effects himself while he is asleep; neither can he guard his effects in his berth during the morning when he is necessarily absent therefrom

for the purpose of making his toilet in a place set apart by the company for that purpose. In *Kates v. Pullman P. C. Co.*, 95 Ga. 810, 23 S. E. 186, it was held that proper diligence of the sleeping-car company toward its patrons involves the exercise of reasonable care to secure the safety of the passenger's property while on its cars, and, upon his leaving it, a restitution of the property to its owner when ascertained; and that where such property is left, or dropped, in such place, under such circumstances as that by the exercise of ordinary care it ought to have been found by them, the company will be liable for its value. If the company owes to a passenger the duty of ordinary care to find property left by him in the car when he disembarks from the car, it would seem that there can be no question that the company owes him a duty to protect such valuables as may be in the berth of the car when he leaves the berth upon the invitation of the company, to be temporarily absent for a proper purpose, such as the purpose for which the plaintiff left her berth in the present case. It was contended that there was nothing to put the company on notice that the plaintiff would leave her valuables in the berth. There was nothing in the *Kates* case (95 Ga. 810, 23 S. E. 186) to put the company on notice that *Kates* would leave his money in the car when he disembarked therefrom. The company is on notice that each passenger will carry such articles of personal apparel and adornment as are usual in the station of life to which the passenger belongs, and as are appropriate to a journey. It is also put on notice that articles of personal apparel and adornment will be taken from the person during the night and will not be restored until the toilet is made the following day. This is sufficient as a notice to require the company to use reasonable care to guard such effects of the passenger during the time that they will not be in his immediate control and in his actual custody. The declaration set forth a cause of action, and was sufficiently specific to put the company ¹⁴⁶ on notice of the character of the demand that it was called upon to defend.

2. The motion for a new trial contained numerous special assignments of error. The extracts from the charge, excepted to, were not erroneous for any of the reasons assigned. The requests to charge, so far as legal and pertinent, were covered by the general charge, which fairly submitted every material issue to the jury. It only remains to consider the

general grounds of the motion. The evidence authorized a finding that the plaintiff had lost the articles described in the petition, and that they were of the value therein alleged. It is said, though, that the plaintiff should not recover, for the reason that the evidence required a finding that the loss of the articles was the direct result of her own negligence in leaving them in the berth when she went to the toilet-room. The character of the business that the sleeping-car company is engaged in is such that it is necessarily charged with notice that when a passenger rises from his berth in the morning, articles of apparel and adornment that will be upon his person during the daytime may be left in the berth, either intentionally or inadvertently, while the passenger is making his toilet; and at such time it is the duty of the company to take such precautions as are necessary to protect the passenger from loss by theft. It cannot be said, as a matter of law, that a passenger who leaves in his berth articles of apparel or adornment during the time that he is making his toilet in the morning is guilty of such contributory negligence as will defeat a recovery for their loss. Whether so leaving them would, in a given case, be such negligence as would defeat a recovery would be a subject for decision by a jury, under all of the circumstances of the particular case. We are aware that in other jurisdictions it has been held that to so leave jewels and other articles of personal adornment in the berth would be such contributory negligence as would defeat a recovery; but in this state, where the question of negligence is one peculiarly for the solution of a jury, such rulings cannot be followed. The evidence authorized the verdict, and we see no reason for reversing the judgment.

Judgment affirmed.

Fish, C. J., absent.

The other justices concur.

A Sleeping-car Company is under the duty to use reasonable care to guard its passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable (*Pullman etc. Co. v. Adams*, 120 Ala. 581, 74 Am. St. Rep. 53; *Nashville etc. Ry. Co. v. Lillie*, 112 Tenn. 331, 105 Am. St. Rep. 947), except where the passenger's own negligence contributes to the loss: *Wicher v. Boston etc. R. Co.*, 176 Mass. 275, 79 Am. St. Rep. 314. The liability of carriers for the baggage of their passengers is discussed at length in the note to *Wood v. Maine Cent. R. B. Co.*, 99 Am. St. Rep. 343.

HARVEY v. THOMPSON.

[128 Ga. 147, 57 S. E. 104.]

APPEAL.—When the Court of Appeals Certifies to the supreme court a constitutional question, a decision of which it finds necessary to a proper determination of the case, the supreme court will not undertake to determine whether the court of appeals has properly decided that a determination of such question is necessary. (p. 374.)

GARNISHMENT—Situs of Debt—Constitutional Law.—A statute is not unconstitutional because it permits the garnishment of the wages of a railway employé, the railway company having lines and agents both in this and in another state, the wages being earned and payable in such other state, and the employé there residing. (p. 380.)

S. N. Gazan, for plaintiff in error.

Travis & Travis, for defendant in error.

¹⁴⁷ COBB, P. J. The court of appeals has certified to this court the following question: "Is the act approved August 13, 1904, entitled 'An act providing for the situs of debts due to nonresidents for purposes of attachment, and for other purposes' (found in Georgia Laws 1904, page 100), contrary either to the constitution of the United States or to the constitution of the state of Georgia, for the reason that the legislature of Georgia has no authority or power to pass an act having an extraterritorial effect. Also, is said act, as applied to a case where it is sought to subject wages earned in the state of Florida by an employé of a railway company having lines of railway, offices, and agents both in the state of Florida and in the state of Georgia (the wages being earned by a locomotive engineer whose entire service was performed in the state of Florida, whose wages by contract were payable there, and who, together with his family, resided in that state), contrary to section 1, paragraph 3, of article 1 of the constitution of the state of Georgia, as embodied in section 5700 of the Code of 1895, or in violation of the clause of the constitution of the United States upon the same subject matter?" The act referred to in the foregoing question is in the following language: ¹⁴⁸ "When any suit is brought by attachment in this state against a nonresident of the state and the attachment is levied by service of summons of garnishment, the situs of any debt due by the garnishee to the

defendant shall be at the residence of the garnishee in this state, and any sum due to the defendant in attachment shall be subject to said attachment." The clause of the constitution referred to in the question declares: "No person shall be deprived of life, liberty, or property except by due process of law."

1. This case is before us under that provision of the constitutional amendment creating the court of appeals which declares that when, "in a case pending in the court of appeals, a question is raised as to the construction of a provision of the constitution of this state or of the United States, or as to the constitutionality of an act of the General Assembly of this state, and a decision of the question is necessary to the determination of the case, the court of appeals shall so certify to the supreme court, and thereupon a transcript of the record shall be transmitted to the supreme court, which, after having afforded to the parties an opportunity to be heard thereon, shall instruct the court of appeals on the question so certified, and the court of appeals shall be bound by the instruction so given": Acts of 1906, p. 26; 126 Ga. xviii. At the hearing of this case counsel for the defendant in error contended that an examination of the record would disclose that a decision of the constitutional question was not necessary to the determination of the case. We decline to examine the record to determine the question thus raised by counsel. Under the constitutional amendment the question as to whether a decision of the constitutional question certified is necessary to the determination of the case before the court of appeals is a matter to be determined by that court; and when it certifies to this court that the determination of such a question is necessary, we cannot undertake to decide whether the court of appeals has properly determined this question. Under the constitution we have no jurisdiction of any of the other questions raised in the case; and it is impossible for us to decide whether the decision of the constitutional question is necessary, without referring to other questions raised by the record. We have no power to review a decision of the court of appeals on any question. The sole authority of this ¹⁴⁹ court in reference to cases coming from that court to this court is to decide the questions certified to this court.

We do not intend to intimate in the slightest way that in our opinion the court of appeals has erred in its conclu-

sion as to the necessity of a decision of the constitutional question. We have simply declined to examine the record as to this matter. The constitution declares that "the decisions of the supreme court shall bind the court of appeals as precedents"; but this means that the court of appeals, in determining a case within its jurisdiction, must respect the prior adjudications of this court. There is nothing in this provision which, under any view, authorizes the supreme court to review any ruling of the court of appeals in any case, whether it reaches this court in the form of a certified question or otherwise. The judgments of that court are binding upon the parties in the cases therein, even though the decision, in a given case, may conflict with the decisions of the supreme court.

2. The question as to where is the situs of intangible property, such as choses in action, for the purpose of attachment and garnishment, is one that has been the subject of numerous decisions. The conflict of opinion on the subject is distressing and hopeless. In some cases it is held that the situs, for the purpose of garnishment proceedings, is the domicile of the principal defendant, and in others that it is the domicile of the garnishee, and still others that it is the domicile of the debtor or wherever he may be found and sued: 20 Cyc. 1036; Brown on Jurisdiction, 2d ed., sec. 150. The conclusion reached by this court in its former decisions was in line with those cases which held that the situs, for the purpose of a garnishment, was at the residence of the principal defendant, that is, at the residence of the owner of the debt: Central of Georgia Ry. Co. v. Brinson, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597; High v. Padrosa, 119 Ga. 648, 46 S. E. 859, 122 Ga. 264, 50 S. E. 97; Glower v. Glidden Varnish Co., 120 Ga. 983, 48 S. E. 355. The law recognizes a right of property in things which are intangible, such as choses in action, and the like. Property of this character, having its existence only in the contemplation of the law, can have no inherent fixed place of existence. The law may give such property a location; but wherever it may be located by the law, at the foundation of its legal location there is, at best, only a fiction. The law cannot indulge the fiction except by attaching the intangible property, which is the creature of the law, to the person ¹⁵⁰ of some individual. It is at this point that the courts have diverged in their conclusions, when it has become necessary to give a chose

in action a location for the purpose of a proceeding in garnishment. Some have fixed this location at the residence of the principal defendant in the garnishment proceeding (that is, the owner of the debt sought to be attached), upon the theory that the intangible property follows the person of the owner. As has been seen, this is the conclusion that the judges of this court have, at different periods, uniformly reached. Other courts have reached the conclusion that, for the purpose of a garnishment proceeding, the place of the residence of the debtor owing the debt sought to be attached (that is, the garnishee) may be treated as the locus of the debt, upon the theory that the debtor is under obligation to pay his creditor, or anyone representing him or claiming under him, whenever and wherever the debt may be demanded of him, in the absence of a statute or a contract regulating the place of payment. Other courts have taken the position that the question is to be determined by ascertaining whether the principal defendant could be sued at the place where the garnishment proceedings are instituted. If so, the debt is subject to the garnishment, if the garnishee is also subject to suit at that place, for the reason that the garnishment proceeding is merely a substituted suit against the principal defendant. In all of the cases, whatever the conclusion that may have been reached, it is the result of what is intended to be an application of the principles of general jurisprudence. The conflict arises from the different opinions as to the application of these general principles. This court, in the cases above cited, reached the conclusion that, under the principles of general jurisprudence, the situs of the debt for the purpose of garnishment was at the domicile of the creditor—that is, where the owner of the debt resides—and not at the domicile of the debtor.

The question now arises, Is it within the power of the General Assembly to change the rule laid down by this court? The General Assembly, of course, has no power to declare that land and tangible personal property situated beyond the limits of this state shall be dealt with by the courts of this state as if it were located here, for the reason that some person interested therein, or having the possession thereof, or under some obligation in connection therewith, happens to be within the limits of this state. ¹⁵¹ Such property not being actually within the jurisdiction of the state, and being actually beyond its jurisdiction, and being of a class that has real

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existence independently of any fiction of the law, its location is where it is actually situated, and, of course, it cannot be made the subject of a seizure under the process of the courts of this state. But where the property has no actual location resulting from the inherent character of the property, and its location depends upon the application of the general principles of jurisprudence as drawn from the common law, the lawmaking power of the state may provide that for certain purposes such property shall have a locus within the state whenever there is within the jurisdiction of the state a person having some relation to the property which can be treated as giving the property a locus within the state without doing violence to some constitutional right of other persons interested therein. The act in question simply changes the rule as laid down by the decisions of this court, so as to prescribe the rule which other courts had laid down as the true rule under the principles of general jurisprudence. The General Assembly has authority to change the rule of the common law, as held by this court, provided the act changing the same is not subject to some constitutional objection. On the subject now under consideration this court simply endeavored to adhere to what it understood to be the true rule derivable from common-law principles. If, for any reason, the rule thus laid down was, in the judgment of the General Assembly, not a wise rule to be followed, it was within the power of that body to change the rule in any way and to any extent that it saw proper, provided there was nothing in the new rule laid down violative of the constitution of this state or of the United States. The fact, therefore, that the act in question changes the rule laid down by the supreme court is; of itself, no reason why it should be held invalid. The law as announced by the supreme court is subject to modification or change by the General Assembly, within the limits above referred to. The sole question, therefore, is whether, without reference to the former decisions of this court, the act in question is subject to any constitutional objection.

While the former decisions of this court are supported by the decisions of other courts of high and respectable standing, the rule laid down by the act in question is one that is also supported by ¹⁵² courts of equally high and respectable standing. In *Williams v. Ingersoll*, 89 N. Y. 508, Earl, J., having laid down, as a general principle, that the situs of the

debt, for the purposes of garnishment, is at the residence of the creditor, and not at the residence of the debtor, says, "The local laws may fix the situs of the debt at the domicile of the debtor, and under such laws it may be effectually attached against a nonresident creditor; and compulsory payment under the attachment will protect the debtor everywhere against a suit for the recovery of the same debt by the creditor": See, also, *Embree v. Hanna*, 5 Johns. 101; *Douglas v. Phoenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 148, 33 N. E. 938, 20 L. R. A. 118. The act in question simply declares that the situs of the debt shall, for the purpose of attachment and garnishment, be at the residence of the garnishee in this state. We are aware that in the case of *Louisville & Nashville R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181, 23 South. 825, 41 L. R. A. 331, that eminent and learned jurist, Mr. Chief Justice Brickell, says, in his opinion, that legislation fixing the situs of debts different from that in which it is fixed under the principles of general jurisprudence "would be as nugatory and ineffectual to dispose of the creditor's property in the debt as would be legislation attempting to acquire jurisdiction over tangible property situated without the state." We cannot concur in this view. The radical difference between the two classes of property would make legislation effectual in the case of one class which would be ineffectual as to the other class.

In *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. Rep. 625, 49 L. ed. 1023, Mr. Justice Peckham says: "Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be served personally upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that state." In that case Harris was a resident of North Carolina, and was indebted to Balk, who was also a resident of North Carolina. Epstein, a resident of Maryland, sued out an attachment in Maryland against Balk, and caused summons of garnishment to be served upon Harris, who was temporarily in Maryland. Judgment was rendered on the garnishment against ¹⁵³ Harris by the court in Maryland. Balk thereafter sued Harris

in North Carolina, and Harris pleaded in bar the Maryland judgment and his payment thereof. It was held that the judgment of the Maryland court was a valid and binding judgment, and that as Balk had notice of the garnishment in time to have appeared in that case and pleaded any defense that he had against Epstein, the judgment of the Maryland court was a complete defense to the suit in the North Carolina court. It is said in that case that the garnishee should notify the defendant of the garnishment proceeding and give him an opportunity to defend, and that failure to give notice may, under some circumstances, be such negligence as would prevent a garnishee from pleading the judgment against him in bar of a subsequent suit by his creditor: See, in this connection, Cent. L. J. 265. In *Chicago etc. Ry. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144, it is said that there are cases both for and against the proposition that it is the duty of the garnishee to notify the defendant. Mr. Rood, in his work on Garnishment, lays down the rule that if the principal defendant has been personally served, or has appeared, no notice need be given him of the proceedings by garnishment, unless such notice is required by the statute under which the garnishment is sued out: Rood on Garnishment, sec. 208. See, also, 20 Cyc. 1054. In *Morgan v. Neville*, 74 Pa. 52, it is said that a garnishee in a foreign attachment to protect himself must give notice to his own creditor. It does not appear, in that case, that there was any statute requiring such notice. In *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 3 Am. St. Rep. 290, 36 N. W. 139, it is said that even though the statute does not require the notice to be given by the garnishee to the judgment debtor, yet the courts have power to require the notice to be given before the garnishee files his answer, in order that the debtor may protect his rights, and, if the money or property is exempt, have an opportunity to plead the exemption.

The conclusion we arrive at is that if the garnishee has a residence in this state, or is temporarily here, and can be served with process, a judgment rendered on the attachment and garnishment is a valid judgment, which binds the plaintiff in attachment and the garnishee. Under the authorities above referred to, it would seem that the question as to whether such judgment may be pleaded in bar by the garnishee, in a subsequent suit by his creditor against him, might depend upon the question whether there ¹⁵⁴ was any fraud

or collusion in reference to the garnishment proceeding, and whether the garnishee was negligent in reference to causing notice to be given to his creditor of the garnishment proceeding in order that he might defend against the claim asserted in that proceeding. These questions are not now before us. A foreign railroad company operating a line of railroad in this state and having agents and a place of doing business within the state, upon whom, under the general laws of the state, process may be served, is a resident of this state, subject to suit under the same rules and regulations where other residents may be sued: *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513; *Southern Ry. Co. v. Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244 (3). The fact that the contract under which the debt arose, sought to be garnished, is, by its terms, payable in another state, would not oust the jurisdiction of this court in a garnishment proceeding, in the event that the court had jurisdiction of the person of the garnishee. In such a case the nonresident debtor could be sued in the courts of this state by his creditor, notwithstanding the fact that the debt was payable elsewhere; the question as to the right to bring garnishment proceedings in this state being whether the garnishee is within the jurisdiction of the court and suit could have been maintained by the principal defendant against his debtor in the courts of this state. We therefore say, in answer to the question of the court of appeals, that the act in question is not contrary to the constitution of the United States, or the constitution of the state of Georgia, for the reason that the general assembly has no authority to pass an act having extraterritorial effect, nor for the reason that it deprives the plaintiff of his property without due process of law.

Fish, C. J., absent.

The other justices concur.

The Situs of Debts for Purposes of Garnishment is the subject of a note to *National Bank v. Furtick*, 69 Am. St. Rep. 113. A resident trustee is chargeable upon a debt payable to a nonresident in the state of his domicile: *Hawley v. Hurd*, 72 Vt. 122, 82 Am. St. Rep. 922. See, too, *St. Louis etc. Ry. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. Rep. 206; *Baltimore etc. R. R. Co. v. Allen*, 58 W. Va. 388, 112 Am. St. Rep. 975; *Krafoe v. Roy*, 98 Minn. 141, 116 Am. St. Rep. 346.

WACHSTEIN v. CHRISTOPHER.

[128 Ga. 229, 57 S. E. 511.]

EJECTMENT—For What Maintainable.—Where One Erects a Building on his own land, but projects the foundation thereof into the soil under the surface of his neighbor's land, the latter may maintain ejectment to recover the portion of his property of which he is thereby ousted. (p. 384.)

Cann, Barrow & McIntyre, for the plaintiff.

U. H. McLaws and W. G. Charlton, for the defendant.

229 COBB, P. J. Wachstein sued Christopher, alleging, in his petition, that the plaintiff was the owner, in fee simple, of a described lot of land in the city of Savannah, and that the defendant had erected upon an adjoining lot, owned by the defendant, a brick building, the northern wall of which extended along the line between the plaintiff's lot and the defendant's lot for a distance of seventy-five feet; that in erecting this wall along the southern line of the plaintiff's lot, the defendant made an excavation, several feet in depth, and placed therein a brick foundation for the wall, extending the entire length thereof, and constructed the foundation beyond the line of the wall, so that it projects into, over, and upon the plaintiff's land, twelve inches at one end and four inches at the other, along the entire length of the wall; that by reason of these facts the defendant is in possession of a strip of land of the character above described, **230** and the plaintiff is denied the full and free possession and enjoyment of that portion of his lot; and that the defendant refuses to deliver possession of the strip of land referred to, notwithstanding the plaintiff has demanded that he remove the encroachment of his foundation. The prayer is that the defendant "be required to remove from the land of petitioner the encroachment of the foundation upon the same." The defendant demurred, on the grounds that the petition set forth no cause of action, and that the only remedy prayed for was beyond the power of the court to grant. The demurrer was sustained, and the plaintiff excepted.

The rule at common law was that ejectment would not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession, or, in other words, it is

only maintainable for corporeal hereditaments: Adams on Ejectment, Waterman's ed., top p. 20. The thing sought to be recovered must be something which, in early times, would have been capable of livery and seisin and physical possession, and of which the owner can be disseised: Sedgwick and Wait on Trial of Title to Land, sec. 97. The wrong sought to be remedied by the action of ejectment was the act which, in effect, constituted the ouster of possession; the remedy being the restoration of the possession to the rightful claimant. Where the wrong complained of consists of a projection over the land, above the surface, not touching or being connected with the soil, such as an overhanging roof or wall, the question as to whether ejectment is the remedy for such wrong is one about which the courts are not agreed. On the one hand it is held that such wrong does not amount to an ouster of the possession of the soil, and that the remedy for the same is by action on the case for damages, and not by ejectment. On ²³¹ the other hand it has been held that the owner of the soil has the right of enjoyment upward and downward indefinitely, and one who erects a structure which overhangs the land of another is guilty of an ouster of the possession of the adjoining proprietor's land, notwithstanding the foundation of the structure is entirely upon the land of him who erects the same: Warvelle on Ejectment, sec. 27; 10 Am. & Eng. Ency. of Law, 2d ed., 531; Tyler on Ejectment, 37; Newell on Ejectment, sec. 11.

In the present case, however, we are not dealing with the projection of a roof or wall, the foundation of which is upon the adjoining property. The controversy now before us is as to the possession of the soil itself. It is true that it is below the surface, but it is tangible; and the defendant is completely in possession of a portion of the soil of the plaintiff. He has ejected the plaintiff from the premises and taken actual possession thereof himself. There has been a complete ouster of the plaintiff's possession. It is true that it does not interfere with the right of the plaintiff to use the surface in any way that he may see proper, so long as he does not desire to utilize the surface in any way that is dependent upon his ownership of that which is below it. If, however, he desires to use his property in a manner which requires excavations to be made, the moment that he undertakes this he finds the possession of his property in some one else. The mere fact

that the thing sought to be recovered is below the surface is no reason why ejectment is not the appropriate remedy. It has been held that ejectment would lie for a coal mine; and this, too, although the claimant owned only the mine, without any title to the soil: Adams on Ejectment, Waterman's ed., bottom p. 21; Sedgwick and Wait on Trial of Title to Land, sec. 108 et seq.; Warvelle on Ejectment, sec. 25. Dr. Warvelle, after referring to the conflict of decisions in reference to one whose rights have been interfered with by overhanging walls and the like, says: "Hence, it would seem, that if one party, building upon his own land, encroaches upon the adjoining land of his neighbor, no question should arise as to the right of the latter to maintain ejectment against the former; and, upon principle, it would further seem, that it is immaterial whether the encroachment is upon the surface of the soil, above it, or below it. In no event should a land owner be obliged to submit to invasion or compelled to part with his property, or any portion thereof, upon ²³² the mere payment of damages by a trespasser": Warvelle on Ejectment, 33. See, also, Newell on Ejectment, sec. 11.

But it is said that when the sheriff attempts to deliver possession he must do so by removing the foundation, and this will imperil, if not destroy, the building which it supports. In other words the argument is that because the wrongdoer may sustain damage, and serious damage, as the result of the reparation which the law gives to the one wronged, the latter must submit to the consequences of the wrongful act. One who ousts another from the possession of his property must take all the consequences resulting from the application of the appropriate remedy given by the law to restore to the owner that of which he has been deprived. In *Ezzard v. Findley Gold Min. Co.*, 74 Ga. 520, 58 Am. Rep. 445, the owner of land had erected a dam across a stream upon his own land. The effect of the dam was to overflow the land of the adjoining proprietor. An action of ejectment was brought by him against the owner of the dam, and it was held that his remedy was not ejectment, but an action on the case for damages. In that case there was no ouster of possession. The conduct of the first-mentioned proprietor was such as to render the enjoyment by the other proprietor of his property less complete than it would have been but for the erection of the dam. It was said that there was no adverse holding of the land grow-

ing out of the fact that it was overflowed by water. The plaintiff was not injured by the direct occupation of his property, but the injury resulted as a consequence of the use to which the defendant put his own property. The plaintiff was still in exclusive possession of every foot of land that he owned. His possession was not disturbed in the slightest. There was no ouster. His land was rendered less valuable by the wrongful act of the adjoining proprietor. He needed no remedy to recover possession. If he had been allowed to recover a verdict in the ejectment case, and the sheriff had gone to restore his possession, he would have found the plaintiff already in possession. We think that case is clearly distinguishable from the one now under consideration. In the case now before us the defendant actually entered upon the land of the plaintiff, took possession of the same, and was using it as his own, to the prejudice of the plaintiff's right of possession. There is nothing in the case of *Hicks v. Brinson*, 100 Ga. 595, 28 S. E. 380, which conflicts with the view now expressed. In that case it was simply held ²³³ that the verdict in the ejectment case was void for uncertainty, and that the sheriff was properly restrained from attempting to execute a writ of possession founded thereon.

Having reached the conclusion that the better view of the matter about which there has been so much conflict of opinion among the courts is that ejectment will lie to recover land of which the plaintiff has been ousted by the erection of a foundation below the surface beyond his own line, it might be unnecessary to add anything to what we have said. But we call attention to the fact that, without reference to what the action may be called, and while counsel has argued the case as if it were an action of ejectment, it is not so styled by the pleader. The question to be determined on the demurrer to the petition, under our code practice, is, whether the facts set forth show a right in the plaintiff and a wrong by the defendant; and if so, the court having jurisdiction of the case will frame the appropriate remedy: Civ. Code, sec. 4929. In *McNorrill v. Daniel*, 121 Ga. 78, 48 S. E. 680, it was said: "The law requires the plaintiff to set forth his cause of action plainly, fully, and distinctly, and, subjected to this test, the petition is sufficient; for it shows a right in the plaintiff and a wrong by the defendant, and this is sufficient to authorize a recovery."

The court erred in sustaining the demurrer to the petition.
Judgment reversed.

All the justices concur.

For What Property or Invasion of Possession ejectment is maintainable, see the recent note to *Butler v. Frontier Tel. Co.*, 116 Am. St. Rep. 568.

EDWARDS v. FARMERS' MUTUAL INSURANCE ASSOCIATION OF GEORGIA.

[128 Ga. 353, 57 S. E. 707.]

INSURANCE—Violation of Condition by Tenant.—The violation by a tenant of the insured of a condition in a fire insurance policy against storing seed cotton on the premises avoids the policy, although the landlord has no notice of such storage. (p. 389.)

INSURANCE—Violation of Condition by Tenant.—Notice to an insurer of a dwelling-house that the insured has let the premises to a tenant does not constitute notice of a violation by the tenant of a condition in the policy against storing seed-cotton in the house or operate as a waiver of the forfeiture resulting therefrom. (pp. 389, 390.)

B. J. Edwards, for the plaintiffs.

Napier & Cox, for the defendant.

³⁵³ LUMPKIN, J. Edwards et al. brought suit against the Farmers' Mutual Insurance Association of Georgia on an insurance policy. The case was submitted to the presiding judge without a jury, upon an agreed statement of facts, containing the following: "Before the execution of the contract, defendant adopted a by-law as follows: 'Liabilities cease at once on dwellings in the Association, in which seed-cotton or loose lint cotton is stored.' This by-law was adopted April 4, 1899. Paragraph 9 of the insurance contract provides that 'The Association and the insured shall be governed by the by-laws of the Association.' About two weeks before the fire, the house was vacated by one McElhannan and his family, who were tenants of W. P. Fambrough. Thereafter said Fambrough, not having sufficient room at a public gin near by, temporarily placed in said house enough seed-cotton to make about two bales, intending to remove said cotton on the next morning after the fire occurred. Said cotton had been placed in the house at intervals, a load at a time, covering a

period of not more than two weeks and not less than one week. On the night before such intended removal, the house, while the seed-cotton was stored therein and while unoccupied by any person, was destroyed by fire. Plaintiffs did not tell said Fambrough, their tenant, he could or could not place seed-cotton in said house, or that the house was insured. At the time of the fire and previous thereto, W. P. Fambrough was the tenant of the plaintiffs, under a written contract, made September 21, 1903, ³⁵⁴ and was occupying and using for farming purposes the premises on which the house was located. Under such contract said Fambrough was to pay to plaintiffs annually for three years a stipulated amount of cotton as standing rent, the plaintiffs, under such contract, not reserving or having any direction, control, or possession of the premises or any part of the same, or any authority to use, control, or restrict the use of the house in question. Plaintiffs received, before the loss occurred, several notices of assessments, each containing the following words: 'N. B. The Association will not be responsible for dwellings or tenant houses burned with seed-cotton in them.' Plaintiffs did not at the time of making said rent contract with said Fambrough, or afterward restrict the use of the house in any manner by said Fambrough; nor did they inform said Fambrough that it would be a violation of a by-law of the association in which the property was insured to place seed-cotton in the house; nor did plaintiffs inform defendant that they had entered into a rent or lease contract with said Fambrough for a term of years, under the terms of which plaintiffs had lost control and direction of the use of the house, for such term of years.

"Plaintiffs continued to pay their assessments after the rent contract was made, and they were accepted by the defendant and not returned. When the policy was issued, the premises were held by one S. C. Cooper as tenant, under a written contract for five years, by the terms of which contract plaintiffs had lost control and direction of the use of the house. Defendant then knew that Cooper was in possession of the premises under some contract with plaintiffs, and J. C. Phillips, the field soliciting agent of the defendant, knew that both Cooper and Fambrough were tenants of the plaintiffs under a contract for standing rent. While said Cooper was such tenant, the said Phillips warned him not to put seed-cotton in the dwelling, and while said Fambrough was such tenant said Phillips, in passing House No. 1, in which Fambrough and his

family were residing, saw certain baskets of seed-cotton in the veranda thereof, called the said Fambrough, and told him that it was a violation of the laws of the insurance association in which the house was insured to put seed-cotton in it. This was in spring of 1904. This was the first knowledge that said Fambrough had that the house he lived in was insured. Defendant knew that ~~355~~ Fambrough was also in possession of the premises under some contract with plaintiffs, and with this knowledge continued to collect of plaintiffs (and never returned or offered to return) the assessments on the house, in the same manner as such assessments were levied and collected previous to the contract with Fambrough and during the tenancy of Cooper. Defendant, when the premises were insured and the policy written, and always thereafter, knew that the plaintiffs did not follow the occupation of farming, and that the use and occupation of the premises were and would be thereafter delegated to others for farming purposes, and defendant did not make any restrictions except what was contained in the policy and the by-laws of the association. Fambrough had on the premises another and usually sufficient place for storing seed-cotton. Defendant knew nothing of the terms of the contract of plaintiffs with said Cooper or said Fambrough, which is now shown to have been in writing, and made no inquiry as to such terms. They do admit that J. C. Phillips, the soliciting agent of the association, knew, as above stated, that both Cooper and Fambrough were tenants of plaintiffs and paying standing rent for the premises, and had this knowledge as to Cooper at the time when the policy was issued, and as to Fambrough before the fire occurred, and received such information from B. J. Edwards, without details. Defendant did not know that such seed-cotton had been placed in the house till after the fire, and never at any time consented for anybody to place seed-cotton in the house. It is further agreed that Mrs. W. P. Fambrough, the wife of W. P. Fambrough, will swear that she was in House No. 1 when the fire started in House No. 2, and that in her opinion the fire did not originate in the seed-cotton in the house, but in the room in which corn was stored, adjoining the room in which the cotton was. Her opinion is based on the facts that when she first saw the fire it seemed to be blazing up from the corn room, and the wind was blowing from the direction of the cotton room. Before the fire occurred plaintiffs did not know that the house had been va-

cated nor that seed-cotton had been placed therein by Fambrough, and did not suspect either of said occurrences. Defendant is a mutual co-operative insurance company. It insures storage houses at the same rates of insurance as dwellings. Defendant is a corporation." The judge rendered judgment in favor of the defendant, and plaintiffs excepted.

³⁵⁶ The defendant is a mutual co-operative insurance company. The by-laws of such a company, adopted in pursuance of the charter and existing at the time of the issuance of a policy, become a part thereof, and the assured is presumed to have notice of them: Civ. Code 1895, sec. 2135. A by-law of this company, in existence when the insurance was effected, declared that "Liabilities cease at once on dwellings in the association, in which seed-cotton or loose lint cotton is stored." The policy, on its face, provided that "The association and the insured shall be governed by the by-laws of the association." The parties had a right to make the contract of insurance, and to include as one of its terms that the liability on a dwelling-house should cease at once upon the storage of seed-cotton in the house. The contract was so made, and it was binding: Ostrander on Fire Insurance, 2d ed., secs. 329, 330, pp. 706, 707. Seed-cotton was stored in the house, and it was destroyed by fire while the cotton was there. It was ordinarily used as a residence by a tenant and his family, and was a dwelling, within the meaning of the by-law. It is contended that because the owner had rented the property, reserving no control over it, and the storing of the cotton in the house was the act of the tenant, unknown to the owner, it did not avoid the policy. The exact question has not been decided in this state. In *Adair v. Southern Mutual Ins. Co.*, 107 Ga. 297, 73 Am. St. Rep. 122, 33 S. E. 78, 45 L. R. A. 201, where the policy under consideration provided for a forfeiture "by any change in the use or condition of the building, including additions or repairs, or by the erection of other buildings, or in any other manner by which the degree of the risk is increased, unless due notice is given to the company and a new agreement is entered into," it was held that the words "change in the use or condition" referred to a change of a permanent nature, and not to a mere temporary use. In discussing the question whether the act of the tenant would affect the insurance of the landlord, Mr. Justice Lewis (page 305) said: "We are inclined to think, however, that the correct rule on this subject is laid down by the supreme

court of Pennsylvania in the case of *Long v. Lycoming Ins. Co.*, 14 Ins. L. J. 622, where it was held in effect that if the act which increased the insurer's risk was that of the tenant, unknown to the landlord, it was no excuse for the infringements ³⁵⁷ of the covenants of the policy": See, also, same case in 115 Ga. 638, 42 S. E. 60.

Outside of this state, while there are some decisions to the contrary, the great weight of authority is to the effect that, under a provision of a policy like that now before us, a forfeiture will result from a violation of it by the tenant of the insured, though unknown to the landlord. In *Long v. Beeber*, 106 Pa. 466, 51 Am. Rep. 532, the case cited in *Adair v. Southern Mutual Ins. Co.*, 107 Ga. 297, 73 Am. St. Rep. 122, 33 S. E. 78, 45 L. R. A. 204, it was held, that under a clause of a policy providing that it should be void if the risk should be increased by the manner of occupancy or use of the premises, "or by any means whatever," without the assent of the company indorsed on the policy, increase of risk by the use by the tenant of the insured of a portable boiler and steam-engine for threshing could be shown; and that "it was immaterial whether the act of the tenant was with or without the knowledge or assent of his landlord." In the case at bar the provision was not merely against increase of risk, but specifically against storing seed-cotton or loose lint cotton in a dwelling, and for so doing a forfeiture was provided. In *Badger v. Platts*, 68 N. H. 222, 73 Am. St. Rep. 572, 44 Atl. 296, it was held that "if a policy of insurance provides that it shall be void if naphtha is used on the premises insured, the use of naphtha by a tenant of the insured invalidates the policy, so far as the insured is concerned, whether he knows of its use or not": See, also, 3 Joyce on Insurance, sec. 2222; 2 Beach on Insurance, sec. 712, and citations; 1 May on Insurance, 4th ed., sec. 227; *Kelly v. Worcester Mutual Fire Ins. Co.*, 97 Mass. 284; *Diehl v. Adams County Mutual Ins. Co.*, 58 Pa. 443, 98 Am. Dec. 302; *Hoxsie v. Providence Mutual Fire Ins. Co.*, 6 R. I. 517; *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551; 2 Cooley's Briefs on Insurance, 1710, 1711.

2. It is argued that the tenant, not the landlord, had control of the premises, and that the occupancy of the tenant put the insurance company on notice of that fact, and of his rights in regard thereto. But notice that the insured had let the premises to a tenant did not constitute notice of a

violation of a provision of the policy in regard to storing seed-cotton in a dwelling-house, or operate as a waiver of the forfeiture resulting therefrom.

Judgment affirmed.

All the justices concur.

The Doctrine of the Principal Case is supported by *Badger v. Platts*, 68 N. H. 222, 73 Am. St. Rep. 572; *German Fire Ins. Co. v. Board of Commissioners*, 54 Kan. 732, 45 Am. St. Rep. 306; but is opposed to *Nebraska etc. Ins. Co. v. Christensen*, 29 Neb. 572, 26 Am. St. Rep. 407.

SOUTHERN RAILWAY COMPANY v. KING.

[128 Ga. 383, 57 S. E. 687.]

IMPUTED NEGLIGENCE.—The Negligence of a Husband While Driving a vehicle is not imputable to his wife, who is riding with him. (p. 392.)

John J. Strickland and Erwin & McMillan, for the plaintiff in error.

Reuben R. Arnold and Howard Thompson, for the defendant in error.

384 BECK, J. The plaintiff, while riding in a buggy with her husband, who was driving, was injured by a collision with a locomotive drawing a passenger train on the defendant's road, at a public crossing. There was evidence showing that the defendant's employes had neglected to observe the blow-post law, and that the train passed over the crossing at a high and negligent rate of speed. There was some evidence tending to show that a traveler along the public highway, on account of obstructions along and near the track of the railway, could not see an approaching train until at or very near the railroad track. But it is not necessary to set out this evidence, or to argue the question as to whether or not, under the evidence, the husband was guilty of such negligence in driving upon the track as would preclude a recovery for injuries resulting to him from the collision. The collision was fatal to him, but this suit was not instituted to recover damages for the homicide of the husband, but was brought to recover damages for injuries which the plaintiff received as a

result of the collision, which she alleges was a result of the negligence of the defendant and its employés, and in no way the result of any negligence on her part. According to the testimony of the plaintiff herself, the husband was the driver of the vehicle in which she was riding at the time she received the injuries, and she was in the buggy as his companion, but exercising no control whatever over him. She thus states the situation in her own words: "When the buggy was struck by the train, my husband was in charge of the buggy and driving. I had nothing to do with it. I was not driving the buggy, had nothing to do with driving the buggy. I did not tell him how to drive it or where to drive it, or where to stop, had nothing to do with it. I was just going with him to church, and coming back with him from church. He was in charge of the mule and buggy."

Under this evidence the question as to whether or not, if the husband was guilty of negligence in driving upon the railroad track, that negligence was imputable to her, necessarily arose. Upon the question of imputable negligence the court charged the jury as follows: "I charge you that if Mrs. King [the plaintiff] was in control of that vehicle in driving it, and having driven it across the railroad, I charge you that if then Mr. King, her husband, was ³⁸⁵ guilty of negligence, whatever negligence he was guilty of would be imputable to her; she would be charged with it. But if he was in control of the private conveyance and driving it and controlling it, and she was going along with him as his companion, then I charge you that she would not be chargeable with his negligence." The exception to the charge is that "the doctrine as applied is not applicable to husband and wife." In the case of *Roach v. Western & A. R. Co.*, 93 Ga. 785, 21 S. E. 67, it was held that where one was riding by invitation in a buggy with another, the negligence of the latter was not imputable to him, unless he "had some right, or was under some duty, to control or influence the driver's conduct": See, also, Civ. Code, sec. 2902. In the case of *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601, 16 S. E. 118, it was held that, "If the plaintiff herself was free from negligence and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant, and it not appearing that she was the owner of the horse or wagon or that she had any agency or concern in procuring or in driving the same, and

nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all the damages consequent upon the injury, and can take no credit as to any part thereof on account of the contributory negligence of the driver of the wagon." And this doctrine is so well recognized that citation of cases supporting it is unnecessary. Its applicability to a case in which the husband was the driver of the vehicle and the wife was his companion at the time she received the injuries, which were due to the concurrent negligence of the husband and the railroad company, seems to be denied by the exception to the charge complained of; but the contention is met by an almost unbroken array of authorities to the contrary. It was said by the supreme court of Indiana: "'Where one accepts the invitation of another to ride in his carriage, thereby becoming in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful or skillful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury.' We can see no good reason why the foregoing statement does not apply to a wife riding with her husband, with as much reason ³⁸⁶ as to a stranger riding with him": Louisville N. etc. R. R. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733. See, also, annotations to this case in footnotes. In the case of Platz v. City of Cohoes, 24 Hun, 101, the supreme court of New York says, "The court charged the jury that the plaintiff was not responsible for carelessness on the part of her husband in driving, unless she did some act encouraging the carelessness; and declined to charge the contrary proposition. In these rulings we are of the opinion that the learned judge was right. They are sustained by abundant authority, conceding that the plaintiff was to be deemed a mere passenger." In his Commentaries on the Law of Negligence, Judge Thompson states the true doctrine to be: "Although there are a few holdings to the contrary, mostly in jurisdictions where the doctrine of imputed negligence is recognized, yet there is no ground, in reason or justice, growing out of the marital relation, for making a different rule from the one just discussed, for the case where a wife has committed her safety to her husband—as where she is riding

in a vehicle and he is driving—than in any other case; and the weight of authority is that, in such a case, the negligence of the husband is not imputed to the wife.”

No other rulings or portions of the charge were excepted to in any grounds of the motion now insisted upon, it being admitted that the questions raised by the other exceptions to the charge were disposed of adversely to the plaintiff in error by the decision in the case of *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508. The negligence of the husband, if he was negligent, under the facts in this case, not being imputable to the wife, the evidence was sufficient to sustain the finding in her favor, and the judgment of the court below refusing a new trial is affirmed.

All the justices concur.

The Decision in the Principal Case has the support of the great weight of authority: See the note to *Hampel v. Detroit etc. R. R. Co.*, 110 Am. St. Rep. 296; *Cotton v. Willmar etc. Ry. Co.*, 99 Minn. 366, 116 Am. St. Rep. 422.

PERRY v. TWEEDY.

[128 Ga. 402, 57 S. E. 782.]

LIFE INSURANCE—Vested Rights of Beneficiary.—In ordinary life insurance, where no power of divestiture or to change the beneficiary is reserved in the policy, the issuance of a policy confers a vested right upon the beneficiary named, and the insured cannot transfer such interest to any other person without the beneficiary's consent. (p. 394.)

LIFE INSURANCE—Rights of Heir of Beneficiary.—Where a husband designates his wife as beneficiary in his life insurance policy, and she dies before he does, her vested interest in the policy is a part of her estate, and those entitled to share in her personal property at the time of her death under the law of succession will be entitled to share in the proceeds of the policy on his death. (p. 395.)

LIFE INSURANCE—Vested Rights of Beneficiary.—In regard to the vested rights of the beneficiary, there is a difference between a certificate of membership in a mutual benefit association and an ordinary life insurance policy. (p. 396.)

Crum & Jones, for the plaintiffs.

W. F. Jenkins & Son and Turner & Adams, for the defendant.

402 LUMPKIN, J. Perry and others, as administrators of Mark C. Perry, brought their action against Tweedy, as administrator of Augusta Perry, alleging as follows: On February 18, 1893, Mark C. Perry obtained a policy of insurance upon his life to be issued by the Mutual Life Insurance Company of New York. By its terms it was made payable to his wife, Augusta Perry, her executors, administrators, or assigns. **403** On April 2, 1894, he obtained another policy, similar to the first. Mrs. Perry died intestate some six years before her husband, having had no children and leaving her husband as her sole heir. From the date of the issuance of the policies to the time of her death, and afterward to the time of his own death, the premiums were paid by him; and at his death there was due and payable on one of the policies \$1,487.50, and on the other \$1,000. He died in the early part of the year 1905. Previous to this there had been no administration on the estate of Mrs. Perry, but, shortly after the death of Perry, Tweedy was appointed as administrator of her estate, and made claim for the amounts due on the policies. Payment was made to him by the company, and the sum so received is now in his hands. Plaintiffs claim that upon the death of Mrs. Perry her interest in the policies descended to and became the property of her husband; that her mother, brothers and sisters who survive her cannot in law become beneficiaries of the policies; and that plaintiffs are entitled to have the proceeds of the policies paid to them for the purpose of paying the debts of Perry and making distribution to his brothers and sisters, who are his next of kin and heirs at law. They have made demand upon Tweedy, as administrator, for such money, but he has refused their demand. They prayed for judgment, for general relief, and for process. The defendant filed a general demurrer to the petition, which was sustained, and the plaintiffs excepted.

According to the great weight of authority, in ordinary life insurance, where no power of divestiture or to change the beneficiary is reserved in the policy, the issuance of the policy confers a vested right upon the person so named as beneficiary, and the insured cannot transfer such interest to any other person without the consent of such beneficiary. It has been suggested that this rule may have had its origin in statutory provisions, and that legislative enactments may have had an influence in the development of the doctrine. However this may have been, the doctrine itself has become a pre-

vailing one, regardless of statutes, and in jurisdictions where no such statutes have existed: 3 Am. & Eng. Ency. of Law, 2d ed., 980 et seq., and notes; New York Life Ins. Co. v. Ireland (Tex.), ⁴⁰⁴ 17 S. W. 617; Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. Rep. 41, 32 L. ed. 370; Hubbard v. Stapp, 32 Ill. App. 541. In Smith v. Head, 75 Ga. 755, it was held that where a husband made a policy of life insurance payable to his wife at his death, it became her property. In the opinion, Chief Justice Jackson said: "This policy, payable at her husband's death, is her property. The policy is payable to her then. It is as much hers as any other property can be, as any note payable in the future, or any fee in remainder, or any other property not to be used by her till a certain event transpires": See, also, Cason v. Owens, 100 Ga. 142, 28 S. E. 75. A policy of life insurance is a chose in action, even before the death of the insured: Steele v. Gatlin, 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129.

These policies were on their face payable, upon the death of the insured, to his wife, her executors, administrators, and assigns. If, as just held, she had a vested interest in them, upon her death during the lifetime of the insured that vested interest or asset was as much a part of her estate as any other personal property which she may have left. Suppose that she had left a chose in action maturing, or a promissory note payable upon the death of her husband, clearly this would have been a part of her estate, and would have been dealt with as such. The fact that a life insurance policy may be terminated by failure to pay premiums, or on other grounds stated in the contract, in no way affects the principle that it is a chose in action, and as such becomes a part of the estate of the deceased beneficiary. Mr. Joyce, after considering various decisions, states the general rule thus: "If a person designates another as beneficiary under a regular life policy, and the person designated dies before the insured, then, in the absence of anything to the contrary in the contract, the interest in the policy will pass to the executor or administrator of the beneficiary, and be subject to distribution under the intestate laws of that state. If the person designated is a wife or some near relative of the insured, and the latter would, under the intestate laws, be entitled to a share of the personal estate of such person, then, under these same laws, the executor or administrator of the insured will be entitled to the same interest in the proceeds of that policy which he would

have been entitled to claim in the other personal estate of the beneficiary": 2 Joyce on Insurance, secs. 828, 829; 4 Cooley's Briefs on Insurance, 3779, 3780, and citations. In 3 American and English Encyclopedia of Law, second edition, 987, it is said that: ⁴⁰⁵ "The insurance policy, being an asset of the beneficiary's estate, is not regarded as being affected differently from any other asset by the beneficiary's death before that of the insured." In 4 Cooley's Briefs on the Law of Insurance, 3780, it is said: "This rule does not preclude the estate of the insured from participating in the proceeds, if the insured is, under the law of descent of property, entitled to share in the estate of the beneficiary." Many cases might be cited in support of the rules thus enunciated. Some of them will be found in the notes to the authorities above quoted. Only a few need be specially cited: Hooker v. Sugg, 102 N. C. 115; 11 Am. St. Rep. 717, and note on page 721 et seq., 8 S. E. 919, 3 L. R. A. 217; In re Anderson's Estate, 85 Pa. 202; In re Baltz's Estate, 12 Phil. 29; In re Dobbel's Estate, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87; Appeal of Deginther, 83 Pa. 337; Olmsted v. Keyes, 85 N. Y. 593.

Without entering into a discussion of the cases which either really or apparently conflict with the ruling here made, we think that they may be divided into three classes: (1) those which turn upon some statutory provision; (2) those which depend upon the peculiar language of the policy in describing the beneficiary or beneficiaries; (3) a few which cannot be sustained upon sound principle or reason. Several of the cases which actually or apparently rule differently have been overruled or disregarded in later decisions.

In Hubbard v. Turner, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593, where a man obtained a policy upon his own life, payable to his "heirs or assigns," he never having had a wife or child. it was held that the word "heirs" was to be construed as next of kin according to the statute of distributions. In the opinion the case was distinguished from that of Rawson v. Jones, 52 Ga. 458, where the insured took out a policy payable to his "heirs, executors, administrators or assigns," he having never been married. In that case it was held that the policy was payable to his legal representatives, and the proceeds were assets in their hands for the payment of debts and for distribution.

Counsel for defendant in error have cited a number of cases arising upon mutual benefit certificates, or the by-laws of ben-

efit societies, in some of which it was held that the interest of the beneficiary was not a vested right, but a mere expectancy. But it is generally recognized that there is a difference between a certificate of membership in a mutual benefit association and an ordinary life insurance policy based either upon the ground of reservations contained ⁴⁰⁶ in the charter or by-laws of the society, or upon the inherent differences in the two forms of insurance: 3 Am. & Eng. Ency. of Law, 2d ed., 990, 991, and notes; Supreme Conclave v. Cappella, 41 Fed. 1; Thomas v. Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882; Masonic Mutual Benefit Soc. v. Burkhardt, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657.

The wife having died without leaving any child or descendants of children, the husband was her sole heir, and, upon payment of her debts, if any, could have taken possession of her estate without administration: Civ. Code 1895, sec. 3354. It does not appear from the petition that he exercised this right, or that he paid her debts, if any. An administrator was appointed on her estate after his death, and received the proceeds of the policy. If the husband was her sole heir, and there were no debts of hers to be paid, her estate would be delivered to his administrator, under the statute of distributions. While there is no direct allegation that the wife left no debts, or as to the exact date of the appointment of the administrator upon her estate, or how long thereafter this suit was brought, no question was made as to these matters. The only point urged was that the administrator of the husband had no interest or right in the proceeds of the policies.

One of the policies required the payment of the stipulated premium for twenty years, and contained provisions for certain distributions of surplus after that time. But as the insured died before the twenty years had expired, this difference between the two policies is immaterial.

From what has been said it will be seen that the court erred in sustaining the demurrer and dismissing the case.

Judgment reversed.

All the justices concur.

The Question Whether the Beneficiary in a life insurance policy or mutual benefit certificate has a vested interest in the fund prior to the death of the insured is involved somewhat in doubt: See Brett

v. Warnick, 44 Or. 511, 102 Am. St. Rep. 639; Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73; Middeke v. Bolder, 198 Ill. 590, 92 Am. St. Rep. 284; United States Casualty Co. v. Kacer, 169 Mo. 301, 92 Am. St. Rep. 641. There seems to be a distinction in this respect between ordinary life insurance and insurance in mutual benefit associations: Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283. The effect of the death of a beneficiary before the insured is discussed in the note to Hooker v. Sugg, 11 Am. St. Rep. 721; Estate of Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123.

GARRETT v. CRAWFORD.

[128 Ga. 519, 57 S. E. 792.]

MORTGAGE—Sale Under Extinguished Power.—Where a mortgage has been paid but the mortgagor has failed to have the satisfaction entered of record, a bona fide purchaser at a sale thereafter made under a power in the mortgage will be protected in his title. The mortgagee, however, is responsible to the mortgagor for whatever damages he sustains on account of the fraud. (pp. 400, 401.)

MORTGAGE—Notice of Sale Under Power.—The statutes do not require a mortgagee to give notice to the mortgagor of an intention to exercise a power of sale contained in the mortgage; and when the instrument contains no provision for notice other than by advertisement in a certain way no other notice is necessary. (p. 402.)

MORTGAGE—Time for Sale Under Power.—A sale under a power in a mortgage should be on a regular sale day, when there is nothing in the mortgage to indicate what was the intention of the parties as to the time of sale. (p. 402.)

M. C. Edwards, for the plaintiff in error.

J. D. & L. M. Rambo and W. A. Scott, for the defendant in error.

⁵¹⁹ COBB, P. J. Jennie A. Crawford brought suit against Mrs. C. E. Garrett and K. J. Todd for a certain house and lot and mesne profits. The petition alleged that Mrs. Garrett had given a mortgage on the property to Wilson; that in accordance with the stipulations contained in the mortgage the property was sold at public outcry, and was bought by the plaintiff; that she holds the title to the property under a deed from Wilson, signed and delivered in pursuance ⁵²⁰ of the stipulations contained in the mortgage; and that Mrs. Garrett and Todd were in possession and refused to surrender possession or to pay the rents and profits of the property. The mortgage was given to secure the payment of a note to

Wilson for one hundred and fifty dollars, and contained the following provisions and powers: "But in case of my failure to pay the same, I hereby empower Wilson, of Fort Gaines, to seize said property and sell the same at public outcry in front of the court-house of said county, after advertising the same in the newspaper in which the sheriff of said county publishes his advertisements, and for me and in my name to make titles to the purchaser and apply the proceeds, first to the cost and expenses of said seizure, sale, and conveyance, including ten per cent attorney's fees, then to the liquidation of this obligation." On the back of the mortgage was a transfer, signed by Wilson, to C. A. Cole, dated July 10, 1899, and also a credit of fifty dollars, dated September 15, 1899. The deed alleged to have been executed in pursuance of the power concluded: In witness whereof the said "Wilson, as attorney in fact for said C. E. Garrett, has hereunto set his hand and seal on the day and year first above mentioned," and was signed by Wilson, whose name in the signature was followed by the words, "Attorney in fact for Mrs. C. E. Garrett." The advertisements stated that the sale would take place on Thursday, April 9, 1901, and the deed bears that date.

Mrs. Garrett filed an answer, in which it was alleged that the plaintiff had no title to the property, for the reason that the note and mortgage given to Wilson were given to secure the payment of his fees as attorney for her son, charged with the offense of murder, seventy-five dollars of which was a retainer fee; that the grand jury did not return any bill against her son for any offense whatever; that more than the seventy-five dollars had been paid the said Wilson before the transfer and before the maturity of the note; that the transfer was without consideration, with full knowledge on the part of the transferee, and was for accommodation only; that the said sale was illegal and void for the reason that Wilson had been paid all that he was entitled to, and therefore had no power to make the sale; and prayed that the deed be canceled as a cloud upon her title. At the trial it was admitted that Todd was merely a nominal party to the suit, and his name was stricken as a defendant. ⁵²¹ It was also admitted that Wilson was dead; and that the rental value of the property was forty-five dollars per annum. On motion of plaintiff's counsel the above-mentioned paragraphs of the answer, in which it was attempted to show the nullity of the mort-

gage foreclosure proceeding and the deed given in pursuance thereof, were stricken. The defendant offered an amendment, alleging that at the date of the foreclosure proceeding and the deed the note had been paid and the mortgage was void; and that she had no representative at the sale and had no actual knowledge of the transaction. The court sustained the objection of counsel for plaintiff that this amendment was insufficient in law as a defense.

The plaintiff introduced evidence showing that the property had been advertised for sale, in accordance with the stipulations contained in the mortgage, and then introduced the deed above referred to. Counsel for defendant objected to the introduction in evidence of the deed, on the ground that it was not executed or signed in the name of C. E. Garrett, in accordance with the terms of the power in the mortgage, but in the name of Wilson, and that it was his individual deed, the words following his name in the signature being words of description. The court overruled the objection. The defendant then offered to introduce evidence relative to the terms of the agreement between her and Wilson, and that she had never received any personal notice of the fact that her property was being advertised for sale, and also evidence relative to the amounts that had been paid Wilson under the contract; all of which evidence was ruled out as being illegal and irrelevant. The judge then directed a verdict in favor of the plaintiff. To each of the rulings stated the defendant excepted.

1. The power of sale in a mortgage simply gives to the mortgagor a remedy for the collection of his debt in a summary way. The presence of such a power in the mortgage simply evidences an agreement between the parties that the mortgagor shall be relieved from the necessity of resorting to a foreclosure at law or in equity. That portion of the mortgage containing the power, like all other contracts, is to be construed so as to effectuate the intention of the parties, and the power must be exercised in accordance with the intention of the parties as indicated ⁵²² in the clause in the mortgage conferring the power. The power is conferred for the purpose of enabling the mortgagee to collect his debt. When the debt has been paid, as between the mortgagor and the mortgagee the power is extinguished. If, after payment in full of the debt, the mortgagee attempts to exercise the power, and becomes a purchaser at the sale thereunder, the sale and

conveyance are void: *Baker v. Halligan*, 75 Mo. 435; *Liddell v. Carson*, 122 Ala. 518. If at such sale a third party becomes the purchaser, who knows that the mortgage was satisfied at the date of the sale, or if the circumstances are such as to charge him with notice of satisfaction, the sale and conveyance are likewise void: *Ledyard v. Chapin*, 6 Ind. 320. One who buys at a sale under a power in a deed or mortgage is bound to inquire into the authority of the person making the sale: *Dwelle v. Blackshear Bank*, 115 Ga. 679, 42 S. E. 49. A purchaser must not only see that the person offering the property has authority to sell, but also inquire as to the terms and conditions upon which the power was granted, and see that the same are complied with. If the instrument containing the power has been duly recorded, the purchaser must look to the record to ascertain whether the power exists, and whether it is being exercised in the manner prescribed. If the instrument has not been recorded, due inquiry must be made of the person attempting to exercise the power. If the instrument has been recorded, and nothing appears of record to indicate that there has been a satisfaction of the debt the instrument was given to secure, a prospective purchaser, in the absence of notice to the contrary, may assume that the debt, or some portion thereof, is still unpaid. The law authorizes the mortgagor, when he satisfies the debt the mortgage was given to secure, to have the mortgage canceled upon the record: Civ. Code, sec. 2737. If he fail to exercise this right, an innocent purchaser at the sale will be protected: *Bausman v. Eads*, 46 Minn. 148, 24 Am. St. Rep. 201, 48 N. W. 769; *Merchant v. Woods*, 27 Minn. 396, 7 N. W. 826. When the record of the mortgage appears uncanceled and shows that the debt was past due, and it also appears that the sale is being had at the time and place and in the manner provided in the power, a bona fide purchaser for value will be protected in his title by what appears on the record, in the absence of knowledge to the contrary: 2 *Jones on Mortgages*, 6th ed., sec. 1907. As between the mortgagor and the mortgagee, a sale under the ⁵²³ power when the debt had been satisfied is, of course, a fraud upon the mortgagor, and the mortgagee would be responsible to the mortgagor for whatever damages he sustained on account of the fraud thus perpetrated upon him; but an innocent purchaser at the sale will be protected in his title; the mortgagor, by

his negligence in failing to have the cancellation entered of record, being, as to such purchaser, estopped from setting up the satisfaction of the mortgage prior to the sale.

2. There is no statute in this state requiring the mortgagee to give notice to the mortgagor that he will exercise the power of sale contained in his mortgage. Whether such notice shall be given, and the character of the notice, depend upon the terms of the instrument containing the power. When the instrument contains no provision in reference to notice other than that the time and place shall be advertised in a given way, no other notice is required than advertisement in the manner prescribed in the instrument: 28 Am. & Eng. Ency. of Law, 2d ed., 788; 2 Jones on Mortgages, 6th ed., sec. 1821.

3. The regular day for public sales is the first Tuesday in each month. The code requires that a sale under a power of sale in a mortgage be on a regular sale day, when there is nothing in the instrument creating the power to indicate what was the intention of the parties as to the time of sale (Civ. Code, sec. 4023); but when there is a stipulation that the sale shall be had after the expiration of a given time for advertisement, a time other than the day of public sales is provided for, and the time of sale may be fixed by the mortgagee on any day subsequent to the expiration of the time required, in advertising the sale in accordance with the terms of the power. The very power now under consideration has been held to fix a time for sale other than the regular day of public sales: Crawford v. Garrett, 121 Ga. 706, 49 S. E. 677. The time of sale must be stated in the advertisement, and the sale must take place on the day, and within the hours, therein fixed; and when the sale takes place on the day and within the hours stated in the advertisement, the sale is valid so far as the time thereof is concerned: 28 Am. & Eng. Ency. of Law, 2d ed., 805.

4. When the power of sale in a mortgage provides that the mortgagee may execute to the purchaser, in a sale under the power, title to the property in the name and behalf of the mortgagor, due ⁵²⁴ regularity requires that the deed should be executed in the name of the mortgagor by the mortgagee as his attorney in fact. It has been held, however, that if the attorney in fact signed the deed in his name, instead of in the name of his principal, such a deed would be a good execution of the power, provided there was enough on the face of the deed to show that in signing he intended to exe-

cute it as the deed of the principal, and not as his own: *Tenant v. Blacker*, 27 Ga. 418. See *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50.

The plaintiff alleged, in her petition, the creation of the debt, the execution of the mortgage, a sale in pursuance of the power therein, and the purchase by her of the property. These facts, if established by evidence, would make out a *prima facie* case in her favor. Those portions of the answer of the defendant which were stricken, as well as the amendment to the answer which the court refused to allow, sufficiently set forth such a state of facts as would evidence a fraud perpetrated upon her upon the part of Wilson and Cole, the transferee. It was distinctly alleged that all that was due on the note had been paid before it was transferred to Cole, and that he took the note with a full knowledge of these facts, as well as of the circumstances under which the note was given. It was distinctly alleged that the consideration of the note was services to be performed by Wilson as an attorney at law in the trial of a son of the defendant for the offense of murder, and that her son had never been indicted, and that therefore the consideration of the note had failed, at least as to one-half, and that the payments made thereon had satisfied the other half due on the note, and that Cole knew all of these facts, and was acting for Wilson merely as an act of accommodation. As stated, there were sufficient averments to show a fraud on the rights of the defendant perpetrated by Wilson and Cole, but there is nothing in the averments of the plea to connect the plaintiff with this fraud. The burden was upon the defendant to show not only that a fraud had been perpetrated upon her, but that the purchaser at the same was a party to the fraud; and this the answer failed to allege. There was no error in striking the portions of the answer setting up the defense of fraud, nor in refusing to allow the amendment; nor were any of the other assignments of error meritorious.

Judgment affirmed.

All the justices concur.

Sales Under Powers in Mortgages and trust deeds are discussed in the notes to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573; *Tyler v. Herring*, 19 Am. St. Rep. 266. Where a mortgage containing a power of sale has in fact been discharged, but the mortgagor has omitted to have the discharge recorded, an innocent purchaser at a foreclosure sale thereafter made will be protected: *Bausman v. Eads*, 46 Minn. 148, 24 Am. St. Rep. 201.

COLUMBUS RAILROAD COMPANY v. WOOLFOLK.

[128 Ga. 631, 58 S. E. 152.]

DOGS—Liability for Malicious Killing.—The owner of a dog may maintain an action against a railway company whose employé in operating a street-car wantonly and maliciously runs down and kills the animal. (p. 407.)

DOGS—Evidence of Value.—In an Action to recover for wrongfully killing a dog, the value of the animal may be proved by evidence of his breed, qualities, and market value. (p. 408.)

A MASTER is Liable for the Willful Torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them. (p. 408.)

Garrard & Garrard and W. C. Neill, for the plaintiff in error.

Slade & Swift, for the defendant in error.

⁶³¹ BECK, J. Woolfolk brought suit to recover the value of a dog alleged to have been willfully and wantonly killed by the running of a street-car on defendant's line of road. It is alleged that plaintiff's dog came on the track about one hundred and fifty feet in front of said car, and in full view of the motorman in charge thereof, and that said motorman immediately, and "with intent to kill said dog, increased the speed of said car, and did willfully, wantonly, maliciously and unlawfully run down said dog," and killed him. The defendant demurred to the petition generally as setting forth no cause of action against it, and because "said petition does not allege that said act of wantonness and malice was done under the command or with the consent of the defendant." It demurred specially to the paragraph which alleged the ⁶³² value of the dog to be two hundred dollars. The court overruled both general and special demurrers, and the defendant excepted.

1. "By the common law, a dog is property, for an injury to which an action will lie: *Wright v. Ramscot*, 1 Saund. 84; 2 Blackstone's Commentaries, 293"; *Uhlein v. Cromack*, 109 Mass. 273; *St. Louis S. W. Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; 2 Am. & Eng. Ency. of Law, 2d ed., 347; 4 Blackstone's Commentaries, 236. As was said by the court in the case of *Graham v. Smith*, 100 Ga. 434, 62 Am. St. Rep. 323, 28 S. E. 225, 40 L. R. A. 503, the property of the owner in a dog "seems to be better defined at common

law than it is by the construction which this court has put upon our statutes." The decision in *Jemison v. Southwestern R. R. Co.*, 75 Ga. 444, 58 Am. Rep. 476, holding that a suit cannot be maintained against a railroad company for the "unintentional, though negligent," killing of a dog, was affirmed in the case of *Strong v. Georgia Ry. & Electric Co.*, 118 Ga. 515, 45 S. E. 366. In the latter case five justices held that inasmuch as the rule in the *Jemison* case (75 Ga. 444, 58 Am. Rep. 476) "has stood as good law since December 1, 1885, and the General Assembly has passed no act changing the same, . . . the rule should not be now changed by overruling that case." Fish, P. J., and Cobb, J., concurred in the opinion in the *Strong* case solely on the ground that it was controlled by the *Jemison* case. Cobb, J., in his concurring opinion, said: "The trend of modern decisions seems to be in favor of treating the dog as property to the same extent that other domestic animals are treated," and cites as authority the very elaborate monograph note, in 40 L. R. A. 503, to the case of *Graham v. Smith*, 100 Ga. 434, 62 Am. St. Rep. 323, 28 S. E. 225; also the note in 37 L. R. A. 659, to the case of *St. Louis Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126. In the *Jemison* case, 75 Ga. 444, 58 Am. Rep. 476, while holding that an owner cannot recover for the "negligent" destruction of his dog, the court expressly ruled that such owner "may maintain an action of trespass vi et armis for the wanton and malicious killing of his dog." Inasmuch as the killing of the plaintiff's dog in the present case is alleged to have been the result of the "willful, wanton and malicious" conduct of the defendant company's employé, we might safely rest our affirmance of the judgment of the court below upon the authority of the *Jemison* case. But it is contended by counsel for plaintiff in error that "The ⁶³³ ruling of the court in that case (that an action would lie for the wanton and malicious killing of a dog) is purely obiter dicta," and that it is not consistent with the other laws of the state. It is true that the question of the liability of the defendant for the wanton and malicious killing of plaintiff's dog was not before the court in the *Jemison* case, but we are unable to assent to the other proposition that such a rule is inconsistent with the other decisions of this court, or with any of the statutes of the state.

The case, cited by plaintiff in error, of *Moss v. Augusta*, 93 Ga. 797, 20 S. E. 653, the same being an action against

the city for the wanton killing of plaintiff's dog by an officer of the city, was decided upon the ground that "a city is not liable for the illegal and tortious acts of its police officers." And the case of *Patton v. State*, 93 Ga. 411, 19 S. E. 734, 24 L. R. A. 732, holding that the willful and malicious killing of a dog is not an indictable trespass under the Penal Code, section 729, was based upon the ground that "That section relates to the injury or destruction of inanimate property, and does not apply to injuring or killing animals of any kind." In the case of *Wilcox v. State*, 101 Ga. 563, 28 S. E. 981, 39 L. R. A. 709, it was expressly held that a dog is a "domestic animal." Under the Civil Code, section 3822, the owner is made liable for certain acts of his dog, "thus recognizing that the dog has an owner, and consequently that the thing owned is property": *People v. Maloney*, 1 Park. Cr. Rep. 593. Under the constitution of the state (Civ. Code, sec. 5883), dogs are treated as property, and the General Assembly is authorized to impose a tax upon them. And the Penal Code, section 164, makes the dog a subject of simple larceny. And an indictment for simple larceny, even of a thing specified by statute, must allege both the ownership of the property stolen and its value: *Davis v. State*, 40 Ga. 229; *Thomas v. State*, 96 Ga. 311, 22 S. E. 956. It must, therefore, be concluded that the criminal branch of the law recognizes the dog as private property, and also as a "thing of value." In the *Strong* case, 118 Ga. 515, 45 S. E. 366, Cobb, J., in his concurring opinion, quotes the language of a decision rendered by the then presiding judge of the Atlanta circuit, holding that a dog was property subject to levy and sale. That question, however, has never come before this court, and is no part of the opinion in the *Strong* case; but the reasoning of the learned circuit judge there quoted is so cogent that we refer to it here as throwing a flood of light upon the question of the true status of ⁶³⁴ the dog in this state. In the case of *Graham v. Smith*, 100 Ga. 434, 62 Am. St. Rep. 323, 28 S. E. 225, it was held that "The owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery in case of its wrongful conversion." In the well-considered opinion it is expressly declared that a dog is property. It should also be remembered that in a trover case the plaintiff has the option of taking a verdict for the property, or a money verdict. It seems to us, therefore, that the principles enunciated in the *Graham* case con-

trol the case at bar; for it would be a strange inconsistency in the law to permit the plaintiff in a trover case to take a money verdict for the value of a dog wrongfully converted, and yet deny him the right to recover the value of a dog wantonly and maliciously killed. True, it has been held in this state that "A dog is not property, except in a qualified sense": *Jemison v. Southwestern R. R. Co.*, 75 Ga. 444, 58 Am. Rep. 476. But even under the common law, where it was likewise declared that the property in a dog was "base property," and where he was not the subject of larceny, such property was nevertheless held to be sufficient to maintain a civil action for its loss. It would appear, therefore, that the rule in the *Jemison* case, which declares that the owner cannot recover for the "unintentional, though negligent, destruction" of his dog, is extremely technical, and has no sound basis to rest upon. And while this court has followed the ruling in the *Jemison* case, so far as to hold that there can be no recovery for the "unintentional, though negligent," killing of a dog, we feel no desire to extend that rule. The *Jemison* case expressly recognizes that the owner may maintain an action for the "wanton and malicious killing of his dog"; and as the allegations of the plaintiff's petition bring this case squarely within the rule last announced, we hold that the petition was good as against a general demurrer.

2. The fifth paragraph of the petition alleges that "said dog was of the value of two hundred dollars." Defendant demurred specially to this paragraph, on the ground that "the measure of damages would not be based upon the value of the dog, as a dog has no market value in contemplation of law." It is true that it was said in the *Jemison* case that: "Dogs seems to have no market value, and the rule of damages in the case of livestock killed by the running of trains could not be applied to them. In case of their wanton and malicious killing or injury, a different rule for ascertaining damages ⁶³⁵ obtains; the act is one which may be compensated by general or exemplary damages." But this was merely obiter, and is not supported by the latest and best authorities. "Large amounts of money are now invested in dogs, and they are largely the subject of trade and traffic": *Mullaly v. People*, 86 N. Y. 365. "It is common knowledge that many dogs have an actual commercial and market value": *Strong v. Georgia Ry. & Electric Co.*, 118 Ga. 515, 45 S. E. 366. The better rule, therefore, for ascertaining the measure

of damages seems to be: "The value of a dog may be proved as that of any other property, by evidence that he was of a particular breed, and had certain qualities, and by witnesses who knew the market value of such animal, if any market value be shown. . . . This was so at common law, yet it was held at common law that the absence of any value was the reason that prevented a prosecution for larceny of a dog": Note in 40 L. R. A. 518; and see numerous cases cited.

3. The principle announced in the third headnote has been frequently ruled by this court, and disposes of all the other assignments of error: *Central Ry. Co. v. Brown*, 113 Ga. 414.

Judgment affirmed.

All the justices concur.

An Action Lies to Recover Damages for the negligent killing of a dog by a railroad company: Harper v. St. Paul City Ry. Co., 99 Minn. 253, 116 Am. St. Rep. 415, and cases cited in the cross-reference note thereto. As to the manner of proving the value of the dog in such cases, see *Hodges v. Causey*, 77 Miss. 353, 78 Am. St. Rep. 525; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754; note to *Hamby v. Samson*, 67 Am. St. Rep. 292.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

DOUGLAS v. BOLINGER.

[228 Ill. 23, 81 N. E. 787.]

WILLS, Correcting Description of Property in.—If there is a misdescription of the subject of a devise, and, after striking out that part of the description which is false, enough remains when read in the light of the circumstances surrounding the testator at the time the will was executed to identify the property he intended to convey, the remaining portion of the description may be so read and the testator's purpose given effect. (p. 410.)

WILLS—Devise of Property by Wrong Description, When may be Given Effect upon the Property Intended.—If a testator owned the west half of the northwest quarter of a section of land and no other portion of such quarter, but in his will he purported to devise the north half of such quarter, the words "north half" may be stricken out as surplusage and the devise given effect as including the west half of that quarter. (pp. 410, 411.)

Suit for the construction of a will. The averments of the bill were to the effect that the testator intended to dispose of the whole of his property and not to die intestate as to any portion thereof; that he owned the west half of the northwest quarter of section 12, and no other portion of such quarter, and intended to devise it to the complainant, but in the will the land was described as the north half of such quarter. The trial court sustained a demurrer to the bill, and the complainant appealed.

Blinn & Covey, for the appellant.

I. R. Brown, for the appellees.

25 SCOTT, J. It appears from the express recitals of the will of Ebenezer M. Douglas, deceased, that he intended by

that document to dispose of all the property of which he died possessed. The bill avers that he was the owner of the west half of the northwest quarter of section 12, in town 20, range 5, in Mason county, Illinois; that he never owned any other part of that quarter section, and that his purpose was to devise that part which he did own to Edward Douglas, subject to a life estate in the widow, but that by error said tract was in the will referred to as the north half instead ²⁶ of the west half of the quarter. If the will be given effect according to its precise wording, not only will the purpose of the deceased to die testate as to all his property be defeated, but his intent will not be effectuated, in that Edward Douglas will not receive certain property which he intended should pass to him.

While words may not be added to a will nor inserted in lieu of other words stricken therefrom, yet if in a will there is a misdescription of the subject of a devise, and if, after striking out that portion of the description which is false, enough of the description remains, when read in the light of the circumstances surrounding the testator at the time the will was executed, to identify the property he intended to convey, the remaining portion of the description may be so read and the testator's purpose given effect: *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553, 28 L. R. A. 149; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570.

In *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, the description contained in the will was, "twenty acres off the west half of the northeast quarter of the northeast quarter of section 33." The testator did not own the northeast quarter of the northeast quarter, but did own the northwest quarter of the northeast quarter, and owned no other land in that quarter section. This court rejected the words "of the northeast quarter" where they first occurred in the description as contained in the will, and, reasoning that the testator's purpose was to devise twenty acres off the west half of that quarter of the northeast quarter of section 33 which he owned, held that the devise would be given effect and taken to convey twenty acres off the west half of the northwest quarter of the northeast quarter of section 33.

The case at bar cannot be distinguished from the one last cited. Striking out the word "north" where it occurs before the word "half" in the description in the clause under con-

sideration in the will of Douglas, leaves a devise of "the half of the northwest quarter of section 12." If the ²⁷ facts are as stated by the bill, viz., that the only land owned in that quarter by the testator was the west half of the quarter, and that it was the purpose of the testator to devise that half of the quarter to Edward Douglas, the devise will be given effect by striking out the false part of the description, to wit, the word "north" where it appears before the word "half" in the description in the clause in question, and by so construing the will as that the remaining portion of the description will be held to convey that half of the northwest quarter of said section 12 which was actually owned by the testator.

The Decker case (121 Ill. 341, 12 N. E. 750) has been followed and approved in Whitcomb v. Rodman, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553, 28 L. R. A. 149, and Huffman v. Young, 170 Ill. 290, 49 N. E. 570.

Appellees rely principally on the cases of Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665, Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13, 16 L. R. A. 321, and Williams v. Williams, 189 Ill. 500, 59 N. E. 566. The distinction between the first of these cases and a case such as the one now before us is pointed out in Decker v. Decker, 121 Ill. 341, 12 N. E. 570. This court, in deciding Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, 21 N. E. 13, 16 L. R. A. 321, differentiated that case from the Decker case. In Williams v. Williams, 189 Ill. 500, 59 N. E. 566, when the false part of the description was rejected, the portion remaining, when read in the light of the circumstances surrounding the testator at the time of the execution of the will, could not be deemed descriptive of the realty which it was said the testator intended to devise, without inserting in that remaining portion of the description words not found in the will.

The decree of the circuit court will be reversed and the cause will be remanded, with directions to overrule the demurrer.

Reversed and remanded.

A Devise of Lands by a description partly false, as where the wrong section number is given, may be effective if what remains, after rejecting the false, reasonably corresponds with real estate indicated by extrinsic evidence: Pate v. Bushong, 161 Ind. 533, 100 Am. St. Rep. 287, and cases cited in the cross-reference note thereto. A will purporting to devise "my real estate, to wit, the southwest quarter of the southwest quarter of section 8," operates as a devise of the

northeast quarter of the southeast quarter of that section, if that was the only land owned by the testator: *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163. The identification by extrinsic evidence of devised land is discussed in the note to *Chappell v. Missionary Society*, 50 Am. St. Rep. 289.

JONES v. ABBOTT.

[228 Ill. 34, 81 N. E. 791.]

WILLS—Agreement not to Make.—The owner of property may make a valid, enforceable agreement binding himself not to dispose of it by will and to permit it to descend according to the laws of intestacy. (p. 416.)

WILLS—Consideration of Contract not to Make.—The compromise of a suit then pending and being defended in good faith constitutes a sufficient consideration for an agreement not to make a will. (p. 416.)

PARTITION Notwithstanding Will to the Contrary.—If the owner of property makes a valid agreement not to dispose of his property by will, and subsequently, disregarding such agreement, undertakes to so dispose of it, one of his heirs at law, who, but for the will, would be entitled to an undivided interest in the property, may maintain a suit for its partition. (p. 416.)

PARTITION.—A Receiver may be Appointed in a suit for partition to take charge of the real estate and collect its rents and profits pending the litigation. (p. 416.)

EXECUTORS, Personal Property Must Pass to the Possession of, Notwithstanding the Testator Agreed not to Make a Will.—If the owner of personal property executes a valid agreement not to make any disposition of it by will, and appoints an executor, the personal property must pass to the executor, who must account therefor to the heirs for the portions to which each would have been entitled had no will been made. (p. 417.)

Ed. Pierce, Lemon & Lemon and E. B. Mitchell, for the appellant.

Ingham & Ingham and John Fuller, for the appellees.

⁸⁷ SCOTT, J. Appellant filed in the circuit court of DeWitt county a bill, and later an amended bill, seeking the partition of real estate and other relief. The court sustained a general demurrer to the amended bill, and from a decree of dismissal this appeal is prosecuted.

From the allegations of the amended bill it appears that on November 14, 1899, Daniel H. Hampleman, who was then a widower over eighty years of age, executed a formal

conveyance of all his property, consisting of a quarter section of land in DeWitt county and a considerable amount of personal property, all of which is estimated to be of the value of \$25,000, to three trustees, who were Ann M. Jones, his daughter, the appellant; Elizabeth Abbott, his daughter, an appellee; and F. M. Jones, husband of appellant. The conveyance authorized and directed the trustees to manage and control the property, to provide for the necessary living expenses of the grantor, and "upon my death, or as soon thereafter as possible, said trustees are, in consideration of the premises, to reconvey all of said property, both real and personal, to my legal representatives, except such portion as has been used in the payment of legitimate expenses for myself and those paid out by said trustees in the management of said estate, and except such further sum or sums of money as said trustees may have paid out by reason of any of my legal indebtedness incurred prior to date hereof." The trustees at once took possession of the property conveyed and administered the trust until about March 21, 1900.

On the sixteenth day of February, 1900, Daniel H. Hampleman and Elizabeth Abbott, one of the trustees, brought suit ³⁸ against the other trustees in the circuit court of DeWitt county, on the chancery side, charging that the execution of the trust deed was obtained by fraud and circumvention, alleging that the grantor was competent to properly care for and manage his property, and praying that the trustees be required to reconvey to Daniel H. Hampleman the property which had been transferred to them by the trust deed. Appellant and her husband answered the bill, denying those material averments thereof upon which the prayer for relief was based. While the record was in this condition, and before any trial was entered upon, the parties to that litigation, accompanied by their respective solicitors, met and entered into an agreement compromising the litigation, and in accordance with the terms thereof the trustees redelivered and reconveyed to Daniel H. Hampleman all the property which had been conveyed to them by him, and he thereupon entered into a contract in writing, dated the twenty-first day of March, 1900, in and by which he ratified the acts of his trustees, and recited the reconveyance of the real estate, and acknowledged the receipt of the personal property which he had conveyed to the trustees, particularly describing the same. That contract also contained a provision in these

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words: "I do hereby, in further consideration of the reconveyance of my property by my said trustees to me, hereby agree and bind myself, my heirs, executors, administrators and assigns, that my said property shall descend to and become the property of my heirs named as beneficiaries in my will heretofore made, or that said property shall descend to my said heirs as per the statute of the state of Illinois in such case made and provided." That agreement also provided that the suit then pending in the circuit court of DeWitt county should be dismissed at the cost of Daniel H. Hampleman, and shortly thereafter it was so dismissed. At a later date, June 11, 1900, however, the complainants in that bill caused the suit to be redocketed, and on October 23, 1900, the court, by agreement, entered a decree finding³⁹ that the trustees had reconveyed all the property received by them, and had made a full accounting of their acts and doings as trustees, and thereupon they were by the court discharged. Upon mutual agreement of all the parties to that suit, John Fuller, the solicitor for the complainants in that suit, was by the same decree appointed a trustee for Daniel H. Hampleman, with a general power to conserve and administer his property for the benefit of Hampleman and subject to the control of the circuit court, and the bill in the case at bar alleges that Fuller entered upon the execution of his trust and continued in the administration thereof down to the time of the death of Daniel H. Hampleman. The latter departed this life on the tenth day of November, 1905, leaving as his only heirs at law appellant, Ann M. Jones, his daughter, and appellees, Elizabeth Abbott, his daughter, and Nellie Nason, child of a deceased daughter, and Albert Hampleman, Marion L. Hampleman, Alice I. Bushman and Sarah Anderson, children of a deceased son.

All of said heirs had reached their majority at the death of Daniel H. Hampleman, and he was then owner of the real estate and of some part or all of the personal property described in the deed of trust and in the contract of March 21, 1900. The instrument referred to in that contract as "my will heretofore made" was a will which had been executed by Daniel H. Hampleman, and which was then in existence but which he thereafter destroyed or revoked. The appellant was a devisee or legatee under the provisions of that will. Shortly after Daniel H. Hampleman's death certain of his heirs at law, other than appellant, caused an in-

strument in writing executed on the eighteenth day of June, 1900, purporting to be the last will of the deceased, to be admitted to probate in said county, by which he bequeathed five hundred dollars to appellant, and the remainder of his estate to his other daughter and the grandchildren above named. John Dagley was nominated to be executor of that instrument, and by its terms directed to convert the entire estate into money for ⁴⁰ the purpose of distributing the same in accordance with the provisions of the will. On January 2, 1906, Dagley was appointed and qualified as executor, and entered upon the performance of his duties. He took possession of the real estate of the testator, and continues to hold the same.

It further appears that upon the death of Daniel H. Hampleman the trust confided to John Fuller terminated, but that there is now in his hands a large amount of personal property received by him as trustee, and that he has made no final settlement of his accounts as trustee. It is further alleged that by virtue of the contract of March 21, 1900, appellant is the owner of the undivided one-fourth of the lands mentioned in that contract and of such of the personal property described therein as was owned by the deceased at the time of his demise, and that appellant, in such ownership, is a tenant in common with the other heirs at law of Daniel H. Hampleman.

The bill prays for partition of the real estate and for an accounting as to the rents; prays that Fuller and Dagley be required to account and each of them be decreed to deliver to appellant the one-fourth of the personal property held by each, respectively, which is included in the agreement of March 21, 1900, and asks the appointment of a receiver pending litigation. All the heirs of the deceased, other than appellant, were, with Fuller as trustee, and Dagley as executor, made defendants to the bill, and all demurred.

Had Daniel H. Hampleman died intestate, the appellant would have inherited from him the one-fourth part of the property mentioned in the contract of March 21, 1900, excepting such portions thereof as might have been used or consumed by him in his lifetime, and her contention is, that as he destroyed or revoked the will which was in existence when that contract was made, she was entitled, under that contract, to the said one-fourth of the property, and with

that right he could not interfere by will made subsequent to the execution of the contract.

⁴¹ The owner of property may make a valid enforceable contract binding himself not to dispose of his property by will and binding himself to permit his possessions to descend according to the laws of intestacy: *Wallace v. Rappleye*, 103 Ill. 229; *Taylor v. Mitchell*, 87 Pa. 518, 30 Am. Rep. 383.

Appellees assert that the contract of March 21, 1900, by which Daniel H. Hampleman agreed to permit his property to descend according to the statute of this state was without consideration and void. At the time that agreement was made the suit was pending by which Daniel H. Hampleman sought to obtain a reconveyance of the property which he had theretofore transferred to three trustees, to be conveyed by them, after his death, to his "legal representatives." That suit, as appears from the bill, was being defended in good faith by his daughter, the appellant, who was one of the trustees, and she finally reconveyed upon his executing the contract in question. This contract itself recites that it is made in consideration of the reconveyance by the trustees, and the bill avers that this contract was made in compromise and settlement of the pending litigation. We think the reconveyance by the trustees and the compromise of the suit then pending afforded a valid consideration for the execution of the contract: *Honeyman v. Jarvis*, 79 Ill. 318; *Pool v. Docker*, 92 Ill. 501; *Jackson v. Horton*, 126 Ill. 566, 21 N. E. 490; *Hall v. Hall*, 125 Ill. 95, 16 N. E. 896; *McDole v. Kingsley*, 163 Ill. 433, 45 N. E. 281.

The significance of the words "legal representatives" as they appear in that portion of the trust deed above set out has been much discussed in the briefs. We think their meaning immaterial in considering the demurrer. Under the facts as they appear from the amended bill the agreement of March 21, 1900, is enforceable in equity: *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722; *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124, 56 N. E. 172, 48 L. R. A. 557; *Wallace v. Rappleye*, 103 Ill. 229; and appellant may have partition and will be entitled to a receiver to take charge of the real estate and collect the rents and profits thereof pending litigation. ⁴² As the property by the contract was to descend as intestate property, the personal property must pass to the executor, who will account to the appellant, if the bill be proven, for the portion thereof to which she is entitled by

the language of the agreement, without any reference to the terms of the will, making deduction for property, if any, enumerated in the agreement which was not owned by Daniel H. Hampleman at his decease. According to the case stated, Fuller should account to the executor for personal property in his hands as trustee at the time of the death of Daniel H. Hampleman.

The decree of the circuit court will be reversed and the cause will be remanded for further proceedings consistent with the views in this opinion expressed.

Reversed and remanded.

A Person may by Contract obligate himself to make a will in a particular way: *Teske v. Dittberner*, 70 Neb. 544, 113 Am. St. Rep. 802; *Laird v. Vila*, 93 Minn. 45, 106 Am. St. Rep. 420; *Stellmacher v. Bruder*, 89 Minn. 507, 99 Am. St. Rep. 609. And no reason is apparent why he may not obligate himself not to make a will: *Taylor v. Mitchell*, 87 Pa. 518, 30 Am. Rep. 383. That an heir may covenant not to contest his ancestor's will, see *Estate of Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134.

SOUTH SHORE COUNTRY CLUB v. PEOPLE.

[228 Ill. 75, 81 N. E. 805.]

INTOXICATING LIQUORS.—The Right to Engage in the Business of Selling intoxicating liquors by retail is not now a common right, and can be exercised only under the terms prescribed by the statute. (p. 420.)

INTOXICATING LIQUORS.—A Dramshop as Defined by the Statutes of Illinois is "a place where spirituous, vinous or malt liquors are retailed by less quantities than one gallon." The legislature had the right to make this definition, and the courts are bound by it. (p. 421.)

INTOXICATING LIQUORS—Dramshops, Social Clubs, When Must be Held to be.—An incorporated social club formed in good faith, not for profit, but for pleasure, social recreation and the promotion of outdoor sports, if liquors are sold therein in less quantity than one gallon, is, under the statutes of Illinois, a dramshop, though such sales are made only to regular members and their guests, and the membership is limited. (p. 421.)

INTOXICATING LIQUORS, Sale of by Social Clubs.—If an incorporated social club formed, not for profit, but for pleasure, social recreation and the promotion of outdoor sports keeps a stock of intoxicating liquors in its clubhouse, which it furnishes only to its members and the guests accompanying them upon the written order of a member, he being charged with the liquor upon bills rendered semi-monthly and making payment accordingly, the charge being

no more than the amount paid by the club for the liquor and service, but greater than the charge for similar supplies in places patronized by the public, such club is guilty of maintaining a dramshop, and must take out and pay for a license accordingly. (p. 424.)

INTOXICATING LIQUORS—Dramshops.—Under the Statutes of Illinois an Incorporated Social Club Must be Declared a Dramshop, though its main purpose is social pleasure and not the making of money, whether the liquor is sold as an incident to the main purpose or otherwise, and although the public generally are not admitted. (p. 425.)

George P. Merrick, Silas H. Strawn and Mason B. Starring, for the appellant.

John J. Healy, state's attorney, Howard S. Taylor and Church, McMurdy & Sherman, for the appellee.

78 CARTWRIGHT, J. By leave of court the state's attorney of Cook county filed in the superior court of said county an information in the name of the people, against appellant, a corporation not for pecuniary profit, organized under the general incorporation laws of this state for pleasure, social recreation and the promotion of outdoor sports, to require it to show by what warrant it sells intoxicating liquors without a license, and praying that its charter should be forfeited and it be ousted of its corporate franchise, or that such other penalty be imposed as the court might deem just. To the information appellant filed a plea showing the nature of the corporation and its objects, and the circumstances and conditions under which it keeps a stock of intoxicating liquors in its club-house and furnishes the same to its members. A general demurrer to the plea was sustained, and appellant having elected to stand by the plea, the court adjudged it to be guilty, as charged in the information, of a misuse of its corporate powers by selling intoxicating liquors without a license and imposed a fine of five hundred dollars, together with the costs. From that judgment an appeal was taken to this court.

The facts stated in the plea, which the court adjudged insufficient as a defense to the charge of the information, **79** are as follows: Appellant is a corporation not for pecuniary profit, and its objects, as stated in its charter, are pleasure, social recreation and the promotion of outdoor sports. The number of resident members is limited to two thousand and nonresident members to two hundred and fifty. An applicant for membership must be recommended, in writing, by at least two resident members, and applications are referred

to and acted upon by a board of governors. The vote upon admission is by secret ballot, two negative votes excluding, and the entrance fee is two hundred dollars, and annual dues fifty dollars, payable semi-annually. Membership is terminated by resignation, failure to pay dues or conduct at variance with the purpose of the corporation or the house rules. Each member is given a certificate evidencing his respective share in the club and his right to its privileges. Appellant owns a club-house and property in Chicago in that portion of the city which was formerly the village of Hyde Park, wherein no license can be issued to anyone to keep a dram-shop, and the club property represents an expenditure of two hundred and fifty thousand dollars. In addition to the club-house, appellant has tennis courts, polo fields, golf courses, stables and other buildings, and the club-house is an elaborate one, including a library, reading-rooms, card and billiard rooms, a dining-room, restaurant, and other facilities. It maintains a riding school, with horses and equipment, and employs a riding master and teachers. It holds regular receptions, lectures, musical and literary entertainments, and the library and reading-room is well stocked, and it serves lunches and dinners. The purpose of the club is the physical and mental improvement of its members, and to that end physical and athletic exercises are provided for the improvement of the bodily and mental health of the members and their families. All the members share equally in the use of the house, grounds, library, literature and entertainments, but members are charged and pay for meals and liquors, and for the services of caddies, boatmen and teachers, and for horses, golf supplies and ^{so} special services. There are about fifty servants, including cooks, stewards, porters, waiters, hostlers and other help, and the membership includes many of the best known and most reputable men in the social and professional world in the city of Chicago. Appellant keeps a stock of intoxicating liquors in its club-house, which it furnishes only to its members and their guests accompanying them, upon a member's written order therefor. It maintains a steward's room, used exclusively by the club steward for preparing and dispensing liquors. The member ordering liquor is charged with it, and the charges are paid upon bills rendered semi-monthly. The charge is no more than the amount paid by the appellant for the liquor and the service, but the charge is greater than the charge for similar supplies in places patron-

ized by the club. The club has obtained a United States retail liquor dealer's license, but the plea avers that it was done unadvisedly and was not necessary.

The right to engage in the business of selling intoxicating liquors by retail is not now a common right, and it can be exercised only in the manner and upon the terms which the statute prescribes: *People v. Cregier*, 138 Ill. 401, 28 N. E. 812. The statute provides for licensing such sales and makes a sale without a license a criminal offense. It provides that whoever, not having a license to keep a dramshop, shall sell any intoxicating liquor in any less quantity than one gallon, or in any quantity, to be drank upon the premises, shall be punished by fine or imprisonment or both; and if appellant has been guilty of a misuse of its corporate power by making sales of liquor to be drank upon its premises, the judgment of the superior court must be affirmed. The only question to be determined is whether the furnishing and delivery of intoxicating liquors by appellant to its own members, to be drank upon the premises, and which are paid for by the individual members to whom the same are furnished and delivered, constitutes a sale. Counsel for appellant admits that the letter of the statute requires any and ⁸¹ every one, without exception, who sells intoxicating liquors in any less quantity than one gallon, or in any quantity, to be drank upon the premises, to take out a license to do so, and he fully appreciates that the definition of a dramshop adopted by the legislature is broad enough to include any place where intoxicating liquors are retailed in less quantity than one gallon, but he says that appellant contests the right to demand a license because it refuses to have its club-house considered a dramshop or to be regarded as a dramshop keeper. The argument is, that the court should not take the language of the statute literally, and that the general intent and spirit of the act do not require that it should be so taken.

A dramshop, as defined by the statute, is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and it is true that the term has in popular acceptation a more restricted meaning. It is commonly used to designate a place where intoxicating liquor is sold at a public bar frequented by the public without restriction, and if the legislature had failed to define what was intended by the term "dramshop," it would be reasonable to presume that it was used in the ordinary and popular sense;

but, of course, the legislature had a right to define what was meant by the term as used in the act, and the courts are bound by the definition. The argument of the appellant is the same as that of the druggist Wright, who felt himself aggrieved that his drugstore should be brought within the definition of a dramshop by the sale, in good faith, of liquor for purely medical purposes. His chief business was the sale of drugs and medicines, and he did not even sell intoxicating liquors as a beverage, as the appellant does. The court put in the background the popular idea of the dramshop, saying that undue importance was given to that term, and enforced the law according to its literal meaning. The court said: "The only safe course is to enforce the law as the legislature has made it, and not defeat ⁸² its execution upon some hypothetical theory of public policy that finds no place or recognition in the act itself": *Wright v. People*, 101 Ill. 126. Appellant's club-house would be no more nor less a dramshop with the license than without it, and if the facts bring it within the definition adopted by the legislature it must be held to be a dramshop, whether the definition accords with the popular understanding or not.

The precise question here involved was decided in the case of *People v. Law and Order Club*, 203 Ill. 127, 67 N. E. 855, 62 L. R. A. 884, where it was held that the dispensing of intoxicating liquors by a social club to its members, without profit, constitutes a sale, and that the fact that a club is organized in good faith for social purposes, and not as a shift or device to evade the provisions of the dramshop act, is immaterial. We should not do more than refer to that decision were it not for the earnest argument of counsel for the appellant that what was there said on the subject was mere obiter dicta as well as wrong in principle and upon authority. The argument that the views expressed were obiter dicta is based on the ground that the court might have held the scheme of the club to be a mere shift and device to evade the statute. It is true that the facts raised an inference that the object of the club was to furnish a place and opportunities for dispensing intoxicating liquors, and a statement to that effect was made in the opinion, following the decision of the case and the conclusion of the court that the fact was immaterial. The brief and argument for the defendant in error in that case were substantially the same as for appellant in this case. The same cases were cited and

relied upon, with the exception of some recent ones referred to hereafter, and the court did not turn aside from the issue in the case to a collateral subject in deciding that the transactions of the club constituted sales. The question whether or not a bona fide social club can dispense liquors to its members without profit and as incidental, merely, to its organization, without taking out a ^{ss} dramshop license, was argued and presented by counsel and submitted for decision, and there was no element of a merely incidental or collateral opinion in what the court said. The leading cases upholding the doctrines contended for by the defendant in error, to the effect that the furnishing of liquors to members of a club is not a sale but a mere transfer of the special property of the other members to one of them, or an equitable and convenient mode of distributing refreshments to the members, or a delivery to the member of his part of the liquor owned by the club, or a distribution among the members of a club of property that belonged to them, or a division among the members of a common stock of liquors according to a previously arranged system, were cited and considered. We spoke in that case with deliberation and within the issues involved, and said that we did not concur in the views of those courts; that much ingenuity had been expended in attempting to show that the distributing or furnishing of liquors to members by a club is not a sale, and that specious defenses of the character stated have received no consideration by courts except in prosecutions for the illegal sale of liquor.

Counsel, however, says that there are two very important and leading decisions made since that case was considered, to which our attention is most earnestly invited. We find upon examination of those cases that they follow, with only slight variation, the course of argument of the previous cases holding that such transactions do not constitute sales, and cite the same cases referred to in the Law and Order case (203 Ill. 127, 67 N. E. 855, 62 L. R. A. 884). The first case is *Klein v. Livingston Club*, 177 Pa. 224, 55 Am. St. Rep. 717, 35 Atl. 606, 34 L. R. A. 94. In that case the club was of the same high character as appellant, and the membership was limited to one hundred residents of the city of Allentown. The court thought there was an implication that the dispensing of liquors by a club was not a sale, for the reason that clubs had been in existence and liquors had been furnished in the same manner for many years before the

prohibitive act was passed, but ⁸⁴ it was conceded that the general words of the law made the sale of liquors without a license illegal anywhere, and the court considered the question whether dispensing liquors in the club constituted a sale as a judicial and not a legislative question. So considered, the court concluded that there was no sale, partly because the club received no profit on the liquor consumed by the members, so that one usual incident of a sale was not present, but principally on the ground that the dispensing of liquors and payment for them by the members were merely an equitable distribution of the common property. The court said that the members were all owners, in equal shares, of the liquor when purchased; that it would be inequitable to require members who do not drink liquor to pay for liquor drank by others; that a proper and equitable way to distribute the advantages, comforts and luxuries of the club among the members was to require the member who drank the liquor to pay for what he drank and those who did not touch the liquor to pay nothing. The other case which we are asked to specially consider is *State v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573. That was an information in the nature of a quo warranto against the St. Louis Club, a corporation formed with the object of promoting by social intercourse the bodily and mental health of the members and by friendly exchange of views and discussions to advance the commercial prosperity of the city of St. Louis. The membership of the club was limited to four hundred residents of the city of St. Louis, and the entrance fee was one hundred dollars and the annual dues eighty dollars. The members obtained liquors in practically the same way as shown in the plea in this case, and no profit accrued to the club. The court found the cases in conflict and irreconcilable, but held that the legislature never intended that a corporation should be licensed to sell liquor; that the scheme of the club was not a mere device to sell liquor in defiance of law, and that the dispensing of liquors was a mere incident, and subsidiary to the higher and chief purpose of the corporation, ⁸⁵ which was advancement, by association, of the bodily and mental health of its members. The court decided that the distribution of intoxicating liquors by a club of that character is not a sale, although it was said that technically it does amount to a sale for some purposes. These cases we think serve to confirm what was said in the case of the Law and Order Club as to the ingenuity

expended in attempting to show that furnishing liquors to members of a club for stipulated prices paid by the members is not a sale, and that no such proposition would receive attention in a case of different character.

It is undoubtedly equitable, as said in the Pennsylvania case, that the members of a club who drink the liquor should pay for it, and that those who do not touch it should not pay anything, but we do not see how it can be said that the transaction is merely an equitable distribution between the members of property belonging to them in equal shares. The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common with the other members or otherwise. An association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership: 25 Am. & Eng. Ency. of Law, 2d ed., 1137. A member of such an association has no individual right or interest in the property and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common, a transfer of a specific part of the property to one for a stipulated price would be a sale. Appellant, however, is incorporated, and its stockholders are not tenants in common of its property, but the title is in the corporation. The right of a stockholder is to participate, according to the amount of his stock, in the profits, and upon the dissolution of the corporation to share in the assets remaining after the payment of debts. If a member should clandestinely enter the club-house and withdraw from what is called the common ⁸⁶ property as much of the liquor as would be represented by his interest as a member, it would hardly be contended that the act would not be larceny. The arguments presented to show that the dispensing of liquors for fixed prices paid by the member is not a sale, if applied to the case supposed or any other conceivable transaction, would certainly be unique. We agree with the views expressed in *State v. Easton Social etc. Club*, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64, that there is no occasion to be astute and to indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit persons in combination to do what individuals without combination could not do.

The fact that there is no profit in a sale does not deprive the transaction of its character as a sale, and surely it makes no difference that the sale of the liquor is only incidental to the main purpose of the club: *Mohrmann v. State*, 105 Ga. 709, 70 Am. St. Rep. 74, 32 S. E. 143, 43 L. R. A. 398. The sale of liquor is but an incident to the business of a drug store or restaurant. It is certainly but a trifling incident to the business of a large hotel. The business is carried on in department stores, where it is but a minor and incidental branch of the whole business: *City of Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 935, 55 N. E. 707, 48 L. R. A. 261. It is immaterial whether the main purpose of a corporation is social pleasure or making money by the sale of merchandise if intoxicating liquor is sold at retail as an incident of the main purpose or otherwise, and neither is the fact that the public, generally, are not admitted.

We are convinced that the former decision of the question here involved was correct, and the judgment of the superior court is affirmed.

Judgment affirmed.

Violations of the Law by Social Clubs selling liquor when not licensed so to do are discussed in the note to *Barden v. Montana Club*, 24 Am. St. Rep. 35; *Mohrman v. State*, 105 Ga. 709, 70 Am. St. Rep. 74, and cases cited in the cross-reference note thereto.

HILL v. KEHR.

[228 Ill. 204, 81 N. E. 848.]

WILLS, Proof of by Proof of Codicil.—If the testimony of a subscribing witness to a codicil is sufficient to entitle it to probate, such testimony also establishes the will. (p. 426.)

WILLS—Statutory Control Over.—The whole subject of wills is under legislative control, and the statute prescribes the exact conditions upon which an instrument shall be admitted to probate as a last will and codicil, and the courts have no right to dispense with any of these conditions. (p. 426.)

WILLS, Essentials of.—To Authorize the Admission of a Will to Probate by the County Court, proof must be made by at least two subscribing witnesses that they were present and saw the testator sign the will or codicil in their presence, or acknowledge the same to be his act or deed, and that they believed him to be of sound mind and memory at the time of such signing or acknowledging, but on an appeal from an order of the county court denying the probate,

the proponent may establish the will by any evidence competent to establish a will in chancery. (pp. 426, 427.)

WILLS—Absence of Belief by a Subscribing Witness Respecting the Soundness of Testator's Mind and Memory.—If one of the subscribing witnesses whose testimony is essential to the probate of a will testifies that he had no reason to question the capacity of the testatrix because he did not know her, and it appears that he had no opinion on the subject, the will is not entitled to probate. (pp. 427, 428.)

Livingston & Vach and George F. Jordan, for the appellants.

S. P. Robinson, for the appellees.

205 CARTWRIGHT, J. The county court of McLean county admitted to probate the paper purporting to be the last will and testament of Catherine Kehr, deceased, and a codicil thereto. Appellants took an appeal to the circuit court, and that court also admitted the will and codicil to probate. From the order of the circuit court this appeal was taken.

The order of the circuit court admitting the will and codicil to probate was based on the testimony of two subscribing witnesses to the codicil, and if their testimony was sufficient to establish the codicil it would also establish the will: *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774. In determining that question it must not be forgotten that the whole subject is under legislative control, and that the statute has prescribed **206** the exact conditions upon which an instrument shall be admitted to probate as a last will, testament or codicil. Courts have no right to dispense with any condition so prescribed or permit the substitution of something different. By the statute all wills are required to be in writing and signed by the testator or testatrix, or by some person in his or her presence and by his or her direction, and attested in the presence of testator or testatrix by two or more credible witnesses, and the testator or testatrix must be of sound mind and memory at the time of the execution of the will. To authorize a county court to admit a will to probate, proof of these facts must be made by the subscribing witnesses, at least two of whom must declare, on oath or affirmation, that they were present and saw the testator or testatrix sign the will, testament or codicil in their presence or acknowledged the same to be his or her act or deed, and that they believed the testator or testatrix to be of sound mind and memory at the

time of signing or acknowledging the same: *Dickie v. Carter*, 42 Ill. 376; *Crowley v. Crowley*, 80 Ill. 469; *Canatsey v. Canatsey*, 130 Ill. 397, 22 N. E. 595. On appeal to the circuit court from an order of the county court admitting a will to probate the requirements are exactly the same, and the proponent of the will is limited to the testimony of the subscribing witnesses: *Andrews v. Black*, 43 Ill. 256; *Weld v. Sweeney*, 85 Ill. 50; *Greene v. Hitchcock*, 222 Ill. 216, 78 N. E. 614. On appeal from an order of the county court denying probate a different rule is prescribed by the statute, and the proponent of the will may support the same by any evidence competent to establish a will in chancery: *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046, 45 L. R. A. 682. It is not necessary that the subscribing witnesses should make their declaration, on oath, in the words of the statute (*Yoe v. McCord*, 74 Ill. 33; *Rice v. Hall*, 120 Ill. 597, 12 N. E. 236), but it is necessary that their declaration should include all the necessary facts.

In this case it is conceded that the testimony of one of the witnesses to the codicil was sufficient to establish the ²⁰⁷ facts specified by the statute, but the testimony of the other witness did not fulfill the statutory requirements. He had no definite recollection of anything that occurred, except the fact that he signed the instrument as a witness. He did not know what the paper was, and that was not necessary: *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536. He did not read the attestation clause or hear it read. He did not recollect whether the testatrix signed the will in his presence, and he did not know her, but thought he was introduced to her. He testified that he was asked by her son, George Kehr, to attest the signature, and also said that the idea he got was that he was to witness the paper, because the testatrix was present. Although his recollection was quite indistinct and uncertain, his testimony might be regarded as sufficient to establish the execution of the will, but he did not testify that he believed the testatrix to be of sound mind and memory at the time of signing or acknowledging the will. The only question asked him on that subject was whether he believed, at the time he was there, she was in her right mind, and he answered, "I have no reason to question it, because I didn't know the lady." It was not necessary for the witness to testify that he knew the testatrix to be of sound mind and memory, and if he had said that he believed

her to be so it would have been sufficient. If a witness entertains a belief, at the time of the execution of the will, that a testatrix is of sound mind and memory, it will meet the requirement of the statute: *In re Will of Ingalls*, 148 Ill. 287, 35 N. E. 743; but it is not sufficient for a witness to say that he had no belief on the subject or did not know whether the testatrix was of sound mind or not: *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237. A witness may form a belief that a testatrix is of sound mind and memory from seeing nothing in her appearance, manner or conduct different from other persons of sound mind: *Dickie v. Carter*, 42 Ill. 376; but in this case the witness only said that he had no reason to question the fact that the testatrix was in her right mind because ²⁰⁸ he did not know her. So far as appears from his testimony he formed no opinion or belief on the subject, and his testimony was lacking in one of the essential requirements of the statute. The circuit court therefore erred in admitting the will to probate.

The order of the circuit court is reversed and the cause remanded.

Reversed and remanded.

In the Execution of a Will the statutory requirements must be substantially complied with. The mode prescribed in the statute is the measure for the exercise of the right, and the heirs can be deprived of their inheritance only by a compliance with this mode: *Estate of Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53; *In re Walker*, 110 Cal. 387, 52 Am. St. Rep. 104.

The Testimony of Subscribing Witnesses in support or opposition of the will when propounded for probate is discussed in the note to *Stevens v. Leonard*, 77 Am. St. Rep. 459.

MORDEN FROG AND CROSSING WORKS v. FRIES.

[228 Ill. 246, 81 N. E. 862.]

MASTER AND SERVANT—Risks of Defects, When Assumed—Promise to Repair.—If an employé knows of defects in an appliance which he is operating, he must be deemed to assume the risks unless there was such a complaint and promise to repair as relieve him from such risk. (p. 432.)

MASTER AND SERVANT.—By the Promise of the Master to Repair a Defect of Which the Servant has Complained, a new relation is created, by which the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following the promise. (p. 432.)

MASTER AND SERVANT.—The Complaint by a Servant of a Defect in Some Appliance He is Required to Operate Must be on Account of Some Danger Apprehended to Himself to relieve him from the assumption of the risk of its future operation, but the complaint will be presumed to have been because of such apprehension when it does not appear to have been made in the interest of the master, nor because the machine did not do good work on account of the defect. (p. 433.)

MASTER AND SERVANT—Notice of Intention to Quit Unless Defect is Remedied, When not Necessary.—An employé who complains of a defect in an appliance on account of danger apprehended to himself need not inform the master of his intention to quit work unless the danger is remedied, but such intention, though not announced, must have existed. (p. 433.)

MASTER AND SERVANT—Machine, When not So Simple that the Defendant must be Presumed to Have Assumed the Risk of Use After Complaint and Promise to Repair.—A shearing and punching machine used for punching holes in iron or steel plates cannot be held to be a machine of which the operating servant has the same knowledge and comprehension as of a simple tool or implement, so that his continuing to operate it after a complaint and promise to repair precludes his recovery for subsequent injury therefrom. (p. 433.)

John Barton Payne, F. J. Canty and J. C. M. Clow, for the appellant.

Robert F. Munsell, for the appellee.

²⁴⁷ CARTWRIGHT, J. Adolph Fries, the appellee, brought this action on the case against Morden Frog and Crossing Works, a corporation, the appellant, in the superior court of Cook county, and by his declaration alleged that the defendant was a manufacturer of heavy railroad supplies, and had in its shop a punching or shearing machine used for punching holes in iron or steel plates; that plaintiff operated said machine as a servant of the defendant, and was required to throw the machine in gear by putting his foot on a lever; that the clutch for throwing the machine in gear was old and worn and unfit for the purpose; that its condition tended to make it slip and throw the lever on which plaintiff's foot rested ²⁴⁸ violently upward; that plaintiff complained to defendant of the condition of the clutch, and received a promise that it would be fixed and a direction to continue at work until the same was done; that, relying upon said promise, plaintiff continued in said employment, and that while plaintiff was in the exercise of due care and caution for his own safety the old and worn clutch slipped from the gear into which it was thrown and caused the lever to fly upward, breaking his leg. The plea was the general issue, and there

was a trial by jury. At the conclusion of the evidence the court refused to give an instruction asked by the defendant directing a verdict of not guilty, and thereupon, by agreement of counsel, the jury were discharged and the issue was submitted to the court, with an agreement that if any amount should be found as damages, such amount should be seventeen hundred and fifty dollars. The defendant presented to the court propositions of law requiring a finding of not guilty, which were refused, and the court found the defendant guilty and entered judgment for seventeen hundred and fifty dollars. On appeal to the appellate court for the first district the branch of that court affirmed the judgment, and this further appeal was prosecuted.

The argument in support of the assignment of errors is devoted to the one proposition that the facts proved were not sufficient, in law, to authorize the finding and judgment, and the trial court ought to have so held upon the propositions of law submitted. There are three divisions of the argument: First, that in the absence of any legal complaint and promise to repair, plaintiff's action would have been barred by the doctrine of assumed risk; second, that the alleged complaint and promise to repair were insufficient, because the complaint was not made on account of any apprehended danger to the plaintiff, and the plaintiff did not indicate to the defendant that he intended to quit the service if the defect was not remedied and was not induced to continue the work by the promise to remedy the defect; third, that even if there was, in fact, a defect rendering ²⁴⁹ the work dangerous, and complaint was made and plaintiff was induced to continue work by a promise to repair, yet the machine was of such simple character as to come within the rule applicable to common tools and implements, and the promise to repair did not relieve plaintiff from assumption of the risk.

The evidence to which the trial court was asked to apply these rules was to the following effect: The machine was a large double punching and shearing machine, standing seven feet high and ten feet long, with a table on each end of the machine. There was a shaft running through the center of the machine, five and one-half inches in diameter, on which there was a wheel or companion piece of the clutch twelve inches in diameter, which revolved at a high rate of speed, and contained recesses into which the teeth or cogs of the clutch were thrown by means of a lever, upon which

the operator placed his foot. The clutch was of the same diameter, with two teeth or cogs, six and one-half inches in length and between one and three-eighths and one and one-half inches deep. This clutch was thrown into the companion piece by a lever, and if the teeth or cogs and recesses met properly the two formed a solid body circular in form, and the machine was thereby started, driving the dies down through the metal. When the operator took his foot from the lever the clutch was thrown back on the shaft by means of a spring and remained idle on the shaft. The teeth or cogs of the clutch were worn and had been gradually growing worse, so that at the time of the accident there was from three-eighths to half an inch worn off the corners, and they were rounded so that the clutch would fly out occasionally and throw the lever up with great force. It was not a new clutch when put on, and defendant, through its foreman, had full knowledge of its condition. The foreman was notified that the clutch was kicking and could hardly be kept in place, and was also notified that another employé had been hurt by the clutch slipping from the gear wheel and ²⁵⁰ throwing the lever back. The defendant was negligent, and its negligence caused the injury to the plaintiff. The machine was operated day and night, and the plaintiff was the night operator. On the night of November 3, 1902, he worked on the machine until about midnight, when he discovered it was working badly, one of the bolts in the die being broken. He then quit work and hung a sign on the machine that it was out of order and needed repairing. The next day, on November 4th, when he came to work, he met the foreman, who told him that the die had been fixed. Plaintiff said, "How about that clutch?" and the foreman replied that they would fix it on Saturday, which was a time when the machine would be shut down. Plaintiff was operating the machine, punching holes in metal plates about half an inch thick and about nine inches square, and the foreman told him that he wanted him to knock all of them out that night that he could; that they were behind their orders. Plaintiff went to work and operated the machine perhaps thirteen hundred times before he was injured, at about 1:30 A. M., and during that time the lever kicked back about half a dozen times. At the time of the injury the teeth or cogs slipped out of the recesses and the lever kicked back with such violence as to break plaintiff's leg.

It is the law that unless there was such a complaint and promise to repair as relieved the plaintiff from assuming the risk arising from the defect he could not recover for his injury. By his contract of employment plaintiff assumed all of the ordinary hazards arising from the performance of the duties of his voluntary engagement, and when he learned, as it is admitted he did, that his work had become more dangerous by reason of the defect in the clutch, he had his election to quit the service or assume the risk arising from the defect. A servant not only assumes all the usual and known dangers incident to his employment, but also takes upon himself the risk arising from defective tools and machinery, if after the employment he knows of the ²⁵¹ defect and voluntarily continues in the service without objection. The law, however, creates an exception or modification of that rule where the servant, after acquiring knowledge of a defect, gives notice of the same to the master, and the master promises to remedy the defect. Ordinarily the master would suffer loss by having the work stopped, and the effect of his promise to repair is to relieve the servant from assumption of risk for a reasonable time thereafter. The servant may continue in the performance of his duties for a reasonable time to permit the performance of the promise, unless the danger is so imminent that no prudent person would encounter it. By the promise a new relation is created, whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following the promise: *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Swift v. Madden*, 165 Ill. 41, 45 N. E. 979; *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416. The question here is whether the evidence fairly tended to prove such a complaint and promise to repair as relieved plaintiff from assuming the risk.

Counsel are also right in the position that the complaint must be on account of some danger to himself apprehended by the servant, but the evidence fairly tended to prove that the complaint of plaintiff was on account of an apprehension of danger to himself. There is nothing in the evidence to indicate that it was made in the interest of the defendant or because the machine did not do good work on account of the defect. Plaintiff testified that he thought the machine was dangerous, and that the danger consisted in the kicking

or flying back of the lever after he had pressed it down with his foot.

It is further insisted that the plaintiff was bound to inform the defendant that it was his intention to quit work unless the defect was remedied. Although he must have had such an intention, we do not regard it as necessary that he should declare that intention in terms. It was the duty ²⁵² of plaintiff to either quit the service when he became aware of the defect, or assume the risk arising from it, unless there was a promise to repair, and the burden was on him to show that he was induced to remain at work by the promise to repair: 4 Thompson on Negligence, sec. 3866. It is because the promise of the master to repair a defect complained of by a servant induces such servant to continue in the employment that the servant is entitled to recover for an injury: 20 Am. & Eng. Ency. of Law, 2d ed., 127. If the promise to remedy the defect did not induce the plaintiff to remain in the service when he would otherwise have abandoned it, the promise would have no effect to create a new relation. The court or jury could determine from all the facts and circumstances whether the plaintiff was induced to remain in the service by the promise to repair the clutch on Saturday, when the machinery would be shut down and the work could be done, and if there was any evidence tending to prove the same, the question whether the plaintiff, relying upon the promise, was induced to remain in the defendant's employ until he was injured, was a question of fact: Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714.

It is contended that the punching and shearing machine comes under the rule of law stated in Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936, and Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 793, applicable to the case of common tools, implements and constructions known to everybody. The work of the plaintiff with this machine was not the performance of ordinary labor with simple and ordinary tools, and we think the machine does not come within the rule invoked. Of course, the plaintiff understood enough about it to know that there was some degree of danger arising from the defect. It cannot be said that he had the same perfect knowledge and comprehension of the machine and its operation that he would have had of a simple tool or implement.

The errors assigned cannot be sustained, and the judgment is affirmed.

Judgment affirmed.

RIGHT OF EMPLOYEE TO RECOVER FOR INJURY SUSTAINED BY REASON OF DEFECT IN MACHINERY, OF WHICH HE HAD NOTICE, WHEN INJURY RESULTED FROM MASTER'S FAILURE TO PERFORM PROMISE TO REPAIR.

I. Promise of Master to Repair.

a. In General, 434.

b. Sufficiency of Notice Required of Servant.

1. In General, 437.

2. To Whom Notice Must be Given, 437.

c. Care Required of Servant Notwithstanding Promise, 438.

d. Sufficiency of Promise, 438.

II. Reliance of Servant on Fulfillment of Promise, 439.

III. Duration of Continuation of Service After Promise to Repair, 440.

IV. Imminence of Danger as Affecting Rule, 441.

I. Promise of Master to Repair.

a. In General.—The rule that a servant employed in the use of dangerous machinery, who voluntarily remains in the service after knowledge of a defect in the machinery or appliances, assumes the risk of any injury he may sustain by reason of such defect, is an undisputed doctrine in law. But there is an exception to this rule when the servant gives his master or some one in his place notice of any defect within his knowledge and the master promises to remedy the defect or remove the danger. If the servant gives such notice and the master promises to remedy the defect, and the servant relying on such promise continues in the service and sustains injury by reason of such defect within a reasonable time after such promise is made, the master is liable, unless the danger is so obvious that an ordinarily prudent man would not have remained in the service under the circumstances: Woodward Iron Co. v. Jones, 80 Ala. 123; Eureka Co. v. Bass, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; Little Rock etc. R. Co. v. Duffey, 35 Ark. 602; King-Rider Lumber Co. v. Cochran, 71 Ark. 55, 70 S. W. 606; Huber v. Jackson & Sharp Co., 1 Marv. (Del.) 374, 41 Atl. 92; Ray v. Diamond State Steel Co., 2 Penne. (Del.) 525, 47 Atl. 1017; Boyd v. Blumenthal, 3 Penne. (Del.) 564, 52 Atl. 330; Cheeney v. Ocean S. S. Co., 92 Ga. 726, 44 Am. St. Rep. 113, and note, 19 S. E. 33; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; St. Clair Nail Co. v. Smith, 43 Ill. App. 105; Illinois Central R. Co. v. Creighton, 63 Ill. App. 165; McCormick Harvesting Machine Co. v. Burandt, 136 Ill. 170, 26 N. E. 588; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714; Chicago Bridge & I. Co. v. Hayes, 91 Ill. App. 269; Swift & Co. v. Madden, 165 Ill. 41, 45 N. E. 979; Westville Coal Co. v. Wood, 96 Ill. App. 616; Illinois Central R. Co. v. North, 97 Ill. App. 124; Swift v. Oneal, 187 Ill. 337, 58 N. E. 416; Illinois Steel Co. v. Mann, 100 Ill. App. 367 (affirmed

in 197 Ill. 186, 64 N. E. 328); Shickle etc. Iron Co. v. Glon, 106 Ill. App. 645; Alton Roller Milling Co. v. Bender, 112 Ill. App. 484; Chicago Tel. Co. v. Schultz, 121 Ill. App. 573; Morden Frog etc. Works v. Fries, 228 Ill. 246, ante, p. 428, 81 N. E. 862; Indianapolis etc. R. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Meador v. Lake Shore etc. R. Co., 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; Standard Oil Co. v. Helmick, 148 Ind. 457, 47 N. E. 14; East Chicago Iron Co. v. Williams, 17 Ind. App. 573, 47 N. E. 26; McFarland Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465; Terre Haute Electric Co. v. Kiely, 35 Ind. App. 180, 72 N. E. 658; Belair v. Chicago etc. R. Co., 43 Iowa, 662; Taylor v. Starr Coal Co., 110 Iowa, 40, 81 N. W. 249; Benhuer v. Creamery Package Mfg. Co., 124 Iowa, 445, 104 Am. St. Rep. 354, 100 N. W. 345; Foster v. Chicago etc. R. Co., 127 Iowa, 84, 102 N. W. 422; Atchison etc. R. Co. v. Sadler, 38 Kan. 128, 5 Am. St. Rep. 729, 16 Pac. 46; Southern Kansas R. Co. v. Croker, 41 Kan. 747, 13 Am. St. Rep. 320, 21 Pac. 785; Missouri etc. R. Co. v. Puckett, 62 Kan. 770, 64 Pac. 631; Atchison etc. R. Co. v. Sledge, 68 Kan. 321, 74 Pac. 1111; Breckinridge Co. v. Hicks, 94 Ky. 362, 42 Am. St. Rep. 361, 22 S. W. 554; Brown v. Long, 108 Ky. 163, 55 S. W. 1079; Bell etc. Co. v. Applegate, 23 Ky. Law Rep. 470, 62 S. W. 1124; Reiser v. Southern Planing Mill etc. Co., 114 Ky. 1, 69 S. W. 1085; Republic Iron etc. Works v. Gregg, 24 Ky. Law Rep. 1627, 71 S. W. 900; Shemwell v. Owensboro etc. R. Co., 117 Ky. 556, 78 S. W. 448; Louisville Hotel Co. v. Kaltenbrun, 26 Ky. Law Rep. 669, 82 S. W. 378; Louisville Belt & Iron Co. v. Hart, 29 Ky. Law Rep. 310, 92 S. W. 951; Poirier v. Carroll, 35 La. Ann. 699; Lynch v. Allyn, 160 Mass. 248, 35 N. E. 550; McKinnon v. Riter-Conley Mfg. Co., 186 Mass. 155, 71 N. E. 296; Lyttle v. Chicago etc. R. Co., 84 Mich. 289, 47 N. W. 571; Roux v. Blodgett etc. Lumber Co., 85 Mich. 519, 24 Am. St. Rep. 102, 48 N. W. 1092, 13 L. R. A. 728; Greene v. Minneapolis etc. R. Co., 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378; Snowberg v. Nelson-Spencer Paper Co., 43 Minn. 532, 45 N. W. 1131; Schlitz v. Pabst Brewing Co., 57 Minn. 303, 59 N. W. 188; Harris v. Hewitt, 64 Minn. 54, 65 N. W. 1085; Smith v. Backus Lumber Co., 64 Minn. 447, 67 N. W. 358; Gray v. Red Lake Falls Lumber Co., 85 Minn. 24, 88 N. W. 24; Vion v. Brooks-Scanlan Lumber Co., 99 Minn. 97, 108 N. W. 891; Conroy v. Vulcan Iron Works, 62 Mo. 35; Stephens v. Hannibal etc. R. Co., 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589; Muirhead v. Hannibal etc. R. Co., 19 Mo. App. 634; Nash v. Dowling, 93 Mo. App. 156; Prophet v. Kemper, 95 Mo. App. 219, 68 S. W. 956; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Studenroth v. Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487; Belleville Stone Co. v. Mooney, 60 N. J. L. 323, 38 Atl. 835, 39 L. R. A. 834; Dowd v. Erie R. Co., 70 N. J. L. 451, 57 Atl. 248; Dunkerly v. Webendorfer Machine Co., 71 N. J. L. 60, 58 Atl. 94; Rice v. Eureka Paper Co., 174 N. Y. 385, 95 Am. St. Rep. 585, 66 N. E. 979, 62 L. R. A. 611;

Larkin v. Washington Mills Co., 45 N. Y. App. Div. 6, 61 N. Y. Supp. 93; Union Mfg. Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Neely v. Southwestern Cottonseed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145; Patterson v. Pittsburg etc. R. R. Co., 76 Pa. 389, 18 Am. Rep. 412; Brownfield v. Hughes, 128 Pa. 194, 15 Am. St. Rep. 667, 18 Atl. 340; Webster v. Monongahela River Consol. Coal etc. Co., 201 Pa. 278, 50 Atl. 964; Talbot v. Sims, 213 Pa. 1, 110 Am. St. Rep. 513, 62 Atl. 107; Collins v. Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156; Louisville etc. R. Co. v. Kenley, 92 Tenn. 207, 21 S. W. 326; Gulf etc. R. Co. v. Donnelly, 70 Tex. 371, 8 Am. St. Rep. 608, 8 S. W. 52; Southern Pacific Co. v. Leash, 2 Tex. Civ. App. 68, 21 S. W. 563; Texas etc. R. Co. v. Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674; note to Gulf etc. R. Co. v. Brentford, 23 Am. St. Rep. 385; Missouri etc. R. Co. v. Nordell, 20 Tex. Civ. App. 362, 50 S. W. 601; Gulf etc. R. Co. v. Garren (Tex. Civ. App.), 72 S. W. 1028; Missouri etc. R. Co. v. Baker, 35 Tex. Civ. App. 542, 81 S. W. 67; Miller v. Bullion-Beck etc. Min. Co., 18 Utah, 358, 55 Pac. 58; Virginia etc. Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; Crooker v. Pacific Lounge etc. Co., 34 Wash. 191, 75 Pac. 632; Babbitts v. Chicago etc. R. Co., 38 Wis. 289; Stephenson v. Duncan, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337; Burnell v. West Side R. Co., 87 Wis. 387, 58 N. W. 772; Ferriss v. Berlin Machine Works, 90 Wis. 541, 63 N. W. 234; Curran v. A. H. Stange Co., 98 Wis. 598, 74 N. W. 377; Nelson v. Shaw, 102 Wis. 274, 78 N. W. 417; Yerkes v. Northern Pacific R. Co., 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33; Ross v. Chicago etc. R. Co., 2 McCrary, 235, 8 Fed. 554 (affirmed in 112 U. S. 377), 5 Sup. Ct. Rep. 184, 28 L. ed. 787; Hough v. Texas etc. R. Co., 100 U. S. 213, 25 L. ed. 612; Parody v. Chicago etc. Ry. Co., 15 Fed. 205, 5 McCrary, 38; Homestake Min. Co. v. Fullerton, 69 Fed. 923, 16 C. C. A. 545; Northern Pacific R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. Rep. 978, 38 L. ed. 958; Detroit Crude Oil Co. v. Grable, 94 Fed. 73, 36 C. C. A. 94; Barney Dumping Boat Co. v. Clark, 112 Fed. 921, 50 C. C. A. 616; Cudahy Packing Co. v. Skounmal, 125 Fed. 470, 60 C. C. A. 306; Crookston Lumber Co. v. Boutin, 149 Fed. 680; Utah Consol. Min. Co. v. Paxton, 150 Fed. 114; Clark v. Holmes, 31 L. J. Ex. 356, 7 Hurl. & N. 937, 8 Jur., N. S., 992, 10 Week. Rep. 405; Holmes v. Worthington, 2 Fost. & F. 533; 1 Shearman and Redfield on Mortgages, 4th ed., sec. 215; Beach on Contributory Negligence, sec. 140; Wood on Master and Servant, sec. 378; Wharton on Negligence, sec. 220.

Where, however, no increased danger to a servant is contemplated from the continued use of the defective appliance, as in the case of ordinary labor with common implements with which the servant is perfectly familiar, the above rule does not apply: Tesmer v. Boehm, 58 Ill. App. 609; Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936; McCormick Harvesting Co. v. Wojciechowski, 111 Ill. App. 641; Meador v. Lake Shore etc. R. Co., 138 Ind. 290, 46 Am. St. Rep.

384, 37 N. E. 721; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Baumwald v. Trenkman* (App. Div.), 99 N. Y. Supp. 182.

In *Meador v. Lake Shore etc. R. Co.*, 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721, it was said: "In cases in which persons are engaged in a dangerous service, it has been many times held that, if the machinery was defective and the plaintiff had knowledge of it, and made objection thereto, and was induced to remain in the defendant's employment by promise or assurance of its repair, and, not having waived the objection, was injured by reason of such defect, and he did not contribute to the injury by his own fault or negligence, he will be entitled to recover; but, in such case, greater care will be required of him than if he had not known of the defect. In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials are furnished, the use of which requires the exercise of great care and skill, it can be scarcely claimed that a defective instrument or tool furnished by the master of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. . . . The fact that he notified the master of the defect, and asked for another implement, and the master promised to furnish it, in such a case does not render the master responsible if an accident occurs."

b. Sufficiency of Notice Required of Servant.

1. **In General.**—The notice which the law requires the servant to give the master in such cases to relieve the servant of the doctrine of assumption of risk does not require that he should state in exact language that he apprehends danger, nor need he give a formal notification that he intends to leave the service if the danger is not removed. The notice need only be such that the master can reasonably infer that the servant is complaining on his own account and desires the danger removed: *Burlington etc. R. Co. v. Leihe*, 17 Colo. 280, 29 Pac. 175; *Huggard v. Glucose Sugar Refining Co.*, 132 Iowa, 724, 109 N. W. 475; *Lewis v. New York etc. R. Co.*, 153 Mass. 73, 26 N. E. 431, 10 L. R. A. 513; *Balle v. Detroit Leather Co.*, 73 Mich. 158, 41 N. W. 216; *Rothenberger v. Northwestern Consol. Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Thorpe v. Missouri Pacific R. Co.*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; *McAndrews v. Montana Union R. Co.*, 15 Mont. 290, 39 Pac. 85; *Alexander v. Tennessee etc. Gold etc. Min. Co.*, 3 N. Mex. 173, 3 Pac. 735; *Gulf etc. R. Co. v. Donnelly*, 70 Tex. 371, 8 Am. St. Rep. 608, 8 S. W. 52.

2. **To Whom Notice Must be Given.**—The notice must be given to the master or his vice-principal, or to some one who is charged with remedying defects. Notice to a fellow-servant is not sufficient: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Thomas v. Bellamy*, 126 Ala. 253, 28 South. 707; *Picarts v. Chicago etc. R. Co.*, 82 Iowa, 148, 47 N. W. 1017; *Union Pacific R. Co. v. Springsteen*,

41 Kan. 724, 21 Pac. 774; *Szotak v. Berwind-White Coal Co.*, 36 Misc. Rep. 98, 72 N. Y. Supp. 647; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. 153, 27 Atl. 577; *Louisville etc. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. 326; *Kidwell v. Houston etc. R. Co.*, 14 Fed. Cas. No. 7757, 3 Woods, 313; *Weeks v. Scharer*, 111 Fed. 330, 49 C. C. A. 372.

c. **Care Required of Servant Notwithstanding Promise.**—Although, the master promises to repair a defect, the servant is required to exercise such reasonable care for his own safety as is commensurate with the danger of which he has complained: *Phillips v. Michaels*, 11 Ind. App. 672, 39 N. E. 669; *Reiser v. Southern Planing Mill etc. Co.*, 114 Ky. 1, 69 S. W. 1085; *Gulf etc. R. Co. v. Brentford*, 79 Tex. 619, 23 Am. St. Rep. 377, 15 S. W. 561; *Miller v. Bullion-Beck etc. Min. Co.*, 18 Utah, 358, 55 Pac. 58. And if the promise is not to repair till a certain date, the servant assumes the risk of any injury sustained until that date: *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Trudeau v. American Mill Co.*, 41 Wash. 465, 83 Pac. 725. So, also, if a definite time to repair the defect or remove the danger has been fixed by the master's promise, the servant assumes the risk if he remains in the employment after the breach of the master's promise to repair: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Andrecsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 719; *Citrone v. O'Rourke Engineering Const. Co.*, 113 App. Div. 518, 99 N. Y. Supp. 241.

d. **Sufficiency of Promise.**—The master's promise to remedy the defect must be definite and certain: *Indianapolis etc. R. Co. v. Watson*, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; *Purcell Mill etc. Co. v. Kirkland*, 2 Ind. Ter. 169, 47 S. W. 311; *Buchner v. Creamery Package Mfg. Co.*, 124 Iowa, 445, 104 Am. St. Rep. 354, 100 N. W. 345; *Wilson v. Winona etc. R. Co.*, 37 Minn. 326, 5 Am. St. Rep. 851, 33 N. W. 908; *Dowd v. Erie R. Co.*, 70 N. J. L. 451, 57 Atl. 248; *McCarthy v. Washburn*, 42 N. Y. App. Div. 252, 58 N. Y. Supp. 1125; *Rice v. Eureka Paper Co.*, 70 N. Y. App. Div. 336, 75 N. Y. Supp. 49; *Mull v. Curtice Bros. Co.*, 74 N. Y. App. Div. 561, 77 N. Y. Supp. 813; *Brewer v. Tennessee Coal Co.*, 97 Tenn. 615, 37 S. W. 549; *Gulf etc. R. Co. v. Garren*, 96 Tex. 605, 97 Am. St. Rep. 939, 74 S. W. 897; *Dwyer v. Nixon*, 108 Fed. 751, 47 C. C. A. 666.

In *Dowd v. Erie R. Co.*, 70 N. J. L. 451, 57 Atl. 248, the promise was to remedy the defect "as soon as he could." The servant sustained injury before the defect was repaired. It was contended by the defendant that the promise was so indefinite that the plaintiff was not justified in relying thereon. But the court in a well-considered opinion said: "The promise was an absolute promise to have it attended to as soon as possible, and while such a qualification of the promise has an important bearing upon the question whether

the time which elapsed was reasonable, it is not such an indefinite promise that the plaintiff might not rely on it." And the promise must not only be definite and certain, but it must also be made as an inducement to the servant to continue in his work: *Shemwell v. Owensboro etc. R. Co.*, 117 Ky. 556, 78 S. W. 448; *International etc. R. Co. v. Turner*, 3 Tex. Civ. App. 487, 23 S. W. 146; *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596, 55 S. W. 362. But it may be general as well as individual: *Atchison etc. R. Co. v. Sadler*, 38 Kan. 128, 5 Am. St. Rep. 729, 16 Pac. 46. And the promise of a representative of the master is sufficient: *Ray v. Diamond State Steel Co.*, 2 Penne. (Del.) 525, 47 Atl. 1017; *Boyd v. Blumenthal*, 3 Penne. (Del.) 564, 52 Atl. 330; *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714; *Lyttle v. Chicago etc. R. Co.*, 84 Mich. 289, 47 N. W. 571; *Louisville etc. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. 326; *Galveston etc. Ry. Co. v. Eckols*, 7 Tex. Civ. App. 429, 26 S. W. 1117; *Hillje v. Hettich* (Tex. Civ. App.), 65 S. W. 491; *Parody v. Chicago etc. R. Co.*, 15 Fed. 205, 5 McCrary, 38; *Homestake Min. Co. v. Fullerton*, 69 Fed. 923, 16 C. C. A. 545. Even though such representative had no authority to make the promise, provided the servant had reasonable grounds for supposing that he did: *Dells Lumber Co. v. Erickson*, 80 Fed. 257, 25 C. C. A. 397. The promise may also be implied: *Kroy v. Chicago etc. R. Co.*, 32 Iowa, 357; *Piearts v. Chicago etc. R. Co.*, 82 Iowa, 148, 47 N. W. 1017; *Stoutenburgh v. Dow etc. Co.*, 82 Iowa, 179, 47 N. W. 1039; *Poirier v. Carroll*, 35 La. Ann. 699; *Gulf etc. R. Co. v. Brentford*, 79 Tex. 619, 23 Am. St. Rep. 377, 15 S. W. 561; *Detroit Crude Oil Co. v. Grable*, 94 Fed. 73, 36 C. C. A. 94. But a conditional promise is not sufficient: *Wilson v. Winona etc. R. Co.*, 37 Minn. 326, 5 Am. St. Rep. 851, 33 N. W. 908; *Huggard v. Glucose Sugar Refining Co.*, 132 Iowa, 724, 109 N. W. 475.

II. Reliance of Servant on Fulfillment of Promise.

The servant must have been induced by the promise to remain in the employment: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Bolton v. Georgia-Pacific R. Co.*, 83 Ga. 659, 10 S. E. 352; *Chicago Bridge & I. Co. v. Hayes*, 91 Ill. App. 269; *Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484; *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78, 53 N. E. 844; *Indianapolis etc. R. Co. v. Watson*, 114 Ind. 20, 5 Am. St. Rep. 578, and note, 14 N. E. 721, 15 N. E. 824; *Atchison etc. R. Co. v. Midgett*, 1 Kan. App. 138, 40 Pac. 995; *Needham v. Louisville & N. R. R. Co.*, 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530; *McClusky v. Garfield etc. Coal Co.*, 180 Mass. 115, 61 N. E. 804; *Daily v. Fiberloid Co.*, 186 Mass. 318, 71 N. E. 554; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Flynn v. Kansas City etc. R. Co.*, 78 Mo. 195, 47 Am. Rep. 99; *Holloran v. Union Iron etc. Co.*, 133 Mo. 470, 35 S. W. 260; *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390, 47 Atl. 613; *Kueckel v. O'Connor*, 73 App. Div. (N. Y.) 594, 76 N. Y. Supp.

829; *Neely v. Southwestern Cottonseed Oil Co.*, 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145; *Mareau v. New York etc. R. Co.*, 167 Pa. 220, 31 Atl. 562; *Brewer v. Tennessee Coal etc. Co.*, 97 Tenn. 615, 37 S. W. 549; *Trotter v. Chattanooga Furniture Co.*, 101 Tenn. 257, 47 S. W. 425; *Houston v. Owen* (Tex. Civ. App.), 67 S. W. 788; *Showalter v. Fairbanks*, 88 Wis. 376, 60 N. W. 257; *Olson v. Dougherty Lumber Co.*, 102 Wis. 264, 78 N. W. 572; *Musser-Sauntry Land etc. Co. v. Brown*, 126 Fed. 141, 61 C. C. A. 207; *Clarke v. Holmes*, 31 L. J. Ex. 356, 7 Hurl. & N. 937, 8 Jur., N. S. 992, 10 Week. Rep. 937. Thus, if the master notifies the servant not to continue because there is danger, the servant assumes the risk, though the master has promised to remove the danger: *City of Kinmundy v. Anderson*, 103 Ill. App. 457. And if the promise is revoked before an injury occurs, the master is not liable: *Neely v. Southwestern Cottonseed Oil Co.*, 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

III. Duration of Continuance of Service After Promise to Repair.

In order that the promise of the master to repair may relieve the servant of assuming the increased risk caused by the defective appliance of which he has knowledge, he must not remain in the service longer than a reasonable time after the master's promise to repair: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007; *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393; *Belair v. Chicago etc. R. Co.*, 43 Iowa, 662; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Stalzer v. Jacob Dold Packing Co.*, 84 Mo. App. 565; *Dowd v. Erie R. Co.*, 70 N. J. L. 451, 57 Atl. 248; *Hillje v. Hettich*, 95 Tex. 321, 67 S. W. 90; *Crutchfield v. Richmond & D. R. R. Co.*, 78 N. C. 300; *Stephenson v. Duncan*, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337; *Showalter v. Fairbanks*, 88 Wis. 376, 60 N. W. 257; *Albrecht v. Chicago etc. R. Co.*, 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 653; *Parody v. Chicago etc. R. Co.*, 15 Fed. 205, 5 McCrary, 38. As to what should be considered a reasonable time is a question difficult of solution, and on this point there is not perfect harmony of opinion. By some it is held to be the time in which the master could reasonably make the promised repairs: *Illinois Steel Co. v. Mann*, 107 Ill. 200, 62 Am. St. Rep. 370, 48 N. E. 417, 40 L. R. A. 781; *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714; *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393; *Parker v. Drakesboro C. C. & M. Co.*, 29 Ky. Law Rep. 825, 96 S. W. 575; *Detroit Crude Oil Co. v. Grable*, 94 Fed. 73, 36 C. C. A. 94. But in *Shearman and Redfield on Negligence*, fourth edition, section 215, it is announced that the servant can remain for any period which will not preclude the reasonable expectation that the promise will be kept, and this doctrine finds support in *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714; *McFarlan Carriage Co. v. Potter* (Ind.), 52 N. E. 209; *McDowell v. Chesapeake etc. R. Co.* (Ky.), 8 S. W. 871; *Stephenson v. Duncan*, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337; *Hough v. Texas etc. R. Co.*, 100 U. S. 213, 25 L. ed. 612.

Other cases hold that what may be a reasonable time depends upon the circumstances of each particular case and is therefore a question for the jury: *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714; *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78, 53 N. E. 844; *Belair v. Chicago etc. R. Co.*, 43 Iowa, 662; *Huggard v. Glucose Sugar Refining Co.*, 132 Iowa, 724, 109 N. W. 475; *Smith v. E. W. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358; *Anderson v. North Pacific Lumber Co.*, 21 Or. 281, 28 Pac. 5; *Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377.

IV. Imminence of Danger as Affecting Rule.

If the danger which the master has promised to remove is so obvious that no ordinarily prudent man would continue in the service until the promise had been fulfilled, the servant is guilty of contributory negligence and the master relieved from liability: *St. Louis etc. R. Co. v. Kelton*, 55 Ark. 483, 18 S. W. 933; *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55, 70 S. W. 606; *Illinois Central R. Co. v. Weiland*, 67 Ill. App. 332; *Illinois Central R. Co. v. North*, 97 Ill. App. 124; *City of Kinmundy v. Anderson*, 103 Ill. App. 457; *Indianapolis etc. R. Co. v. Watson*, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; *Crum v. North Vernon Pump etc. Co.*, 34 Ind. App. 253, 72 N. E. 193 (affirmed in 163 Ind. 596, 72 N. E. 587); *Southern Kansas R. Co. v. Croker*, 41 Kan. 747, 13 Am. St. Rep. 320, 21 Pac. 785; *Atchison etc. R. Co. v. Midgett*, 1 Kan. App. 138, 40 Pac. 995; *Shemwell v. Owensboro etc. R. Co.*, 117 Ky. 556, 78 S. W. 448; *Louisville Hotel Co. v. Kaltenbrun*, 26 Ky. Law Rep. 669, 82 S. W. 378; *Conley v. American Express Co.*, 87 Me. 352, 32 Atl. 965; *Ford v. Fitchburg R. R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Shackleton v. Manistee etc. R. Co.*, 107 Mich. 16, 64 N. W. 728; note to *Bass v. Northern P. R. R. Co.*, 33 Am. St. Rep. 766; *Rothenberger v. Northwestern Consol. Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Francis v. Kansas City etc. R. Co.*, 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *McAndrews v. Montana Union R. Co.*, 15 Mont. 290, 39 Pac. 85; *Spencer v. Worthington*, 44 App. Div. (N. Y.) 496, 60 N. Y. Supp. 873; *Fick v. Jackson*, 3 Pa. Super. Ct. 378; *Mayott v. Norcross*, 24 R. I. 187, 52 Atl. 894; *Eardman v. Illinois Steel Co.*, 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993; *Gowen v. Harley*, 56 Fed 973, 6 C. C. A. 190; *Musser-Sauntry Land etc. Co. v. Brown*, 126 Fed. 141, 61 C. C. A. 207; *Smith v. Dowell*, 3 Fost. & F. 238.

The rule that an employé assumes the risk if he continues in the service, relying upon the master's promise to repair, when the danger is obvious, is well expressed in *Eardman v. Illinois Steel Co.*, 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993. "The doctrine that an employé can rely upon the master's promise to repair within a reasonable time, to rebut a charge that such employé assumed the

risk, is by no means without limitation. If the risk is so obvious and immediate that serious injury may probably result from a continuance of the work, then the doctrine that the employé can proceed, relying upon the promise to repair or to remove the danger, does not apply. This exception to the exception, if we may call it such, is supported by several good reasons, among which are that it is not consistent with reasonable prudence for one to submit himself voluntarily to imminent danger of probable immediate serious injury, relying upon a mere promise on the part of anybody that such danger would be removed after a time; and further, that when such danger exists, there is no such thing as a reasonable time to repair, other than presently and before the work proceeds further. To be sure, there are respectable authorities that go so far as to hold that a promise by the employer to repair relieves the employé of the consequences of the risk, though the danger be constant, immediate, and serious; but the weight of authority and the doctrine of this court are the other way. The true rule is well stated in the opinion by Mr. Justice Elliott in *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824, as follows: 'If the services cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employé, he assumes the risk if he continues the employment.' Discussing the subject, Justice Elliott says further, in effect, it is a fundamental principle in this branch of jurisprudence that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to see why a promise should relieve a party from his own contributory fault. If the danger is not great and constant, then such promise may well be deemed to relieve him; but when it is great and immediate, and of such a nature that a prudent man would not ordinarily incur it, a promise does not nullify or excuse the contributory negligence."

OWEN v. CRUMBAUGH.

[228 Ill. 380, 81 N. E. 1044.]

WILLS—Testamentary Capacity—Belief in Spiritualism.—If a person is sane on all other subjects, he cannot be pronounced incompetent to make a will because he was an ultraist regarding the doctrines embraced in the articles of faith of a spiritualistic association, and there is no evidence of any insane delusion on his part which cannot be accounted for by reason of his belief in spiritualism. (pp. 447, 456, 463.)

WILLS—Testamentary Capacity.—Any Mere Mental Aberrations Resulting in the Subnormal Exercises of the Faculties which do not result in such impairment of the reason, judgment or memory as to

render the testator unable to understand the business of making a will and the effect of the disposition to be made of his property will not vitiate the will. (p. 457.)

WILLS.—An Insane Delusion must be Such an Aberration as Indicates an unsound and deranged condition of the mental faculties as distinguished from the mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence. A belief which results from a process of reasoning from evidence, however imperfect the process may be or illogical the conclusion, is not insane delusion. (p. 458.)

WILLS.—An Insane Delusion is not Established when the court is able to understand how a person, situated as the testator was, might have believed all that the evidence shows he did believe, and still have been in the full possession of his senses. (p. 458.)

WILLS.—A Belief in Spiritualism cannot be held to be an insane delusion. (p. 458.)

WILLS.—A Testator cannot be Held to Have Had an Insane Delusion, Because He Believed that the death of his child had been caused by certain of his relatives through their taking away a cow and rendering it necessary for the child to be fed upon the milk of another cow, if, as a matter of fact, they did take away the cow, and the child subsequently sickened and died, though it further appears he believed that the facts relating to the death of the child had been revealed to him by a spiritual communication. (pp. 461, 462.)

WILLS—Insane Delusions.—A Testator's Belief that He was Saved from Harm on Several Occasions by a Guiding Spirit does not establish insane delusions on his part, disabling him from making a will, if the circumstances of his having been in danger, and having escaped therefrom, without injury, were real, and if any delusion existed, it was only in accounting for his preservation. (p. 462.)

WILLS—Insane Delusion Respecting Spiritualism.—A belief on the part of the testator that the spirit of his deceased son and that of other deceased friends held communication with him and also a belief in spiritualistic photography did not show any departure from the usually accepted belief of spiritualistic organizations, and hence is not evidence of an insane delusion. (pp. 463, 464.)

WILLS—Insane Delusions—Evidence of Physicians as to the Effect of a Belief in Spiritualism.—The testimony of physicians that if the testator believed in spiritualism as set out in the hypothetical questions addressed to them, he was insane, amounts to no more than their statement that persons who believe in spiritualism are insane, and does not support a verdict setting aside a will on account of the insanity of the testator. (pp. 465, 466.)

Fifer & Fifer, Welty, Sterling & Whitmore and Barry & Morrissey, for the appellant.

Stone & Oglevee, De Mange & Hoblit, Beach, Hodnett & Trapp, E. D. Riddle and J. F. Bishop, for the appellees.

384 VICKERS, J. This is a bill in chancery brought by certain nephews and nieces of James T. Crumbaugh to set aside his will on the grounds of undue influence and want of testamentary capacity. Wesley M. Owen, as executor, and others were made defendants. An issue at law was tried by

a jury, resulting in a verdict finding that the instrument in question was not the will of the testator. At the close of all the evidence a motion was made, accompanied by an instruction to that effect, to direct a verdict for proponents. This motion was overruled and the instruction refused. From a decree setting aside the will and probate thereof the executor appeals to this court.

The testator was born January 28, 1832, and died April 3, 1905, leaving his widow, Elizabeth J. Crumbaugh, surviving him. He left no children or descendants of children. One brother and three sisters and certain nephews and nieces were his only surviving heirs at law. His widow died since the commencement of this suit. The testator resided on a farm in McLean county, Illinois, practically all of his life, until the year 1883, when he moved to the city of Leroy, in said county, where he resided until his death. He was the owner of thirteen hundred acres of valuable farm land in McLean county, a number of town lots in the city of Leroy and a considerable amount of personal property. His entire estate is estimated at about \$250,000. After moving to Leroy the testator engaged in the banking business with his brother. After his brother's death the private bank was reorganized as a national bank, and testator became ³⁸⁵ the vice-president and a member of the loaning committee, and performed the duties of those offices until his death. About thirty years prior to the death of the testator his only child, a boy, was born, who lived but six weeks. By the will the testator devised \$1,000 to his brother, Daniel T. Crumbaugh, and \$1,000 each to Caroline Rogers, Martha Bartlett and Nancy Hamilton, sisters of the testator. In addition to these legacies about \$2,000 was distributed in small amounts among certain of his other more distant relatives. Some of his remote relatives were not given anything. As bearing upon the omission of the testator to make provision for all of his relatives the following excerpt from the will is pertinent:

“(5th.) Fifth—Again I mention that I have herein made bequests to only a portion of my relation, and be it understood that I have not forgotten the name or relationship of any, but that I have given every one of such relation as I care to do and whom I feel I should, and those whom I have not mentioned I most emphatically feel are not entitled

to anything from my estate. As they are not named by me I do will that they receive nothing.”

To his wife the testator devised the rents, income and profits of all of his property, of every kind and character, for her natural life, not otherwise specifically devised, and in addition she was given about two hundred acres of farm land in fee, and he made her the residuary legatee of all his undisposed of property, of every kind and character. By the eighth clause of the testator's will he disposes of the greater portion of his estate, as follows:

“(8th.) Eighth—Be it now understood that the property now possessed by my wife and I, was made, secured and accumulated by the application of hard labor and economy, and I know that the public is aware that my relatives aided me but very little and that I have been necessitated to help them far more than they have assisted me, so in the light of my desire, and with the warm approval of my beloved ^{and} wife, I now give, will and bequeath to Wesley M. Owen, of Leroy, Illinois, to A. L. Coffey, of Leroy, Illinois, to Clay West, of Leroy, Illinois, to F. L. Horine, of Monarch, Illinois, and to James Loar Bonnett, of Bloomington, Illinois, ‘in trust,’ as trustees, and their successors in office, to be named as hereinafter provided, and to be held in trust forever and forever and under the following conditions and restrictions, subject, however, to the life estate of my wife, as hereinafter provided, my home and prairie farm in West township, also the Thomas L. Wiley farm, now held by me under contract of purchase and which I shall receive by deed on March 1, 1902, and all of which land is more particularly described as follows, to wit: Section eighteen (18) and the south half of section seven (7), town 22, north, range 5, east, in West township, also the east half of the east half of section thirteen (13), township twenty-two (22), north, range four (4), east, in Empire township, all in McLean county, Illinois, which includes about eleven hundred (1100) acres, to the same more or less. Now be it understood that I do give, will and bequeath the same to such above named five people, and their successor in office, ‘in trust’ as ‘trustees,’ and to be so ‘held in trust’ by them forever and forever, under the following conditions and restrictions and for the purposes hereinafter named and mentioned: That is, I first will and direct that my wife shall have all the rents and profits of the above mentioned real estate during the time of her natural life, the same to be

collected and paid her by my executor, but at her death, or in the event of her death before mine, then it is my will and the desire of my wife that such above mentioned real estate of eleven hundred acres (1100) shall go to and be held by said trustees and their successors 'in trust' for the purposes herein named; that is, as soon as there shall accumulate in their hands sufficient money, I direct that there be built on lots 1, 2, 3, 4, 5 and 6, of block 135, Wood & Conkling's addition to Leroy, Illinois, being the vacant property just ³⁸⁷ east of my residence and which I purchased from the Collins heirs, a spiritualist church and a public library for the use of the public, without any restrictions, and in which any individual, of either sex or color, may worship or enjoy the library; said spiritualist church shall be of modern design, so built that it shall face with its main entrance to the west, and shall have in addition to the church auditorium a Sunday school room; that said trustees shall secure, from time to time, some spiritualist minister or lecturer, and which minister or lecturer shall be under the charge and direction of said trustees, but it is my desire that said trustees endeavor to have regular spiritual services in said church, and that such minister or lecturer be one who shall exert every means to promote the gospel and who is in sympathy with the spiritualist organization; that such church shall be known as the 'J. T. and E. J. Crumbaugh Spiritualist Church,' and should the time ever come when there should be no spiritualists in Leroy or vicinity, then such church and Sunday school room shall be used for such church purposes as said trustees or their successors may desire and decide, but in no event and under no circumstances shall such church building be used for any other purpose than a meeting-house for the spiritualists, whenever there shall be any to attend or those who desire such meeting. It is my further will, and I do so direct, that there be constructed after but in addition to such spiritualist church, and on a site just east of such church, and in which there shall be erected a tablet or memorial bearing a suitable testimony to my dear beloved wife and I, a free and public library; that such building shall be built of modern design and to and in connection with such church, but shall be just east of the church and shall face or front to the north: that is, the church entrance shall be to the west or on Pearl street, while the library entrance shall be to the north and on Center street. The said library building, when completed,

shall be equipped and furnished with such books, literary works, papers and letters as will ³⁸⁸ best promote and advance good society and make men better, morally and intellectually; that such public library shall be known as the 'J. T. and E. J. Crumbaugh Public Library,' and shall be under the entire control and management of said above-named trustees and their successors in office; that said trustees shall compile and publish such rules as will be necessary, from time to time, in the use and care of the books, etc., and shall at all times and under every circumstance make it easy and pleasant for the poor children of Leroy to see and use such library. Now, to the end that such spiritualist church, to be known as the 'J. T. and E. J. Crumbaugh Spiritualist Church,' be built and endowed, and to the end that such public library, to be known as the 'J. T. and E. J. Crumbaugh Public Library,' be built and endowed, I do so will, give and bequeath to said above-named trustees, and their successors in office, all the land and real estate (1100a.) mentioned as being situated in section 7 and 18 of town 22, north range 5, east, and section 13, town 22, north, range 4, east, McLean county, Illinois, to be held by them in trust forever and forever, (subject to the life estate of my wife), for said purposes above mentioned. Now, be it further understood. that at no time and under no circumstances can such trustees, their successors or any one, sell, convey or mortgage any part or portion of such above described tract of eleven hundred acres, but that the same shall be held by said trustees and their successors in office 'in trust' for the purpose of building said church and public library. It is my further desire, and I do so will, give and bequeath for the purpose of selecting and naming the site of such J. T. and E. J. Crumbaugh Spiritualist Church and the J. T. and E. J. Crumbaugh Public Library, lots 1, 2, 3, 4, 5 and 6, block 135, Wood & Conkling's addition to Leroy, Illinois, to the said Wesley M. Owen, A. L. Coffey, Clay West, F. L. Horine and James Loar Bonnett, trustees, and their successors in office, as hereinafter named, to be held in trust forever and forever and on which to build ³⁸⁹ said church and library. It is further my will and desire that the said trustees and their successors use all honorable means in renting and keeping in repair all said real estate, taking charge of the same at the death of my wife, or in the event of her death before mine, then at my death, and whenever there shall accumulate in

their hands sufficient sums, they shall erect a church building first, and provide the same with a minister or lecturer, and subsequently, and so soon as accumulations will warrant, erect and furnish said library: Provided, that should I during my life, or after my death my wife, erect said church building on said lots, then and in that event there shall be added and constructed such additions as will be necessary to meet the terms and provisions of this my last will and testament. It is here further provided that said trustees shall formulate, compile and publish on the first day of June each and every year after taking charge of such property, a full and complete report, showing the aggregate amounts of rents received, from whom, and the expenses incurred in renting, taxes, insurance, etc., and all receipts and disbursements of said J. T. and E. J. Crumbaugh Spiritualist Church and J. T. and E. J. Crumbaugh Public Library, which report shall be published in a Leroy paper, a copy filed with the city clerk of said city of Leroy, Illinois; that the books and records of such church and library shall be at all times open to public inspection, and no trustee shall prevent anyone from making all reasonable investigation as to the disposition made of any moneys. Said trustees shall have the right to make all rules and regulations necessary for the use and control of the church and library: Provided, the rules of said church shall conform and be in sympathy with the rules and regulations of the national organization of spiritualists, and no rule for church or library shall defeat the end that all who desire and have honest intentions may enjoy the virtue of worship or the pleasure of library work. It is my further will that when such spiritualist church shall have been ³⁹⁰ erected, with Sunday school room, and said public library shall have been erected and equipped, then such rents shall be applied to the care of farm, the enlargement of church or the enlargement of library, but in no way shall it be used to defeat the desire that said rents endow and forever maintain said church and library. It is further provided that said Wesley M. Owen, A. L. Coffey, Clay West, F. L. Horine and James Loar Bonnett, trustees, and their successors in office, shall hold office during their residence in McLean county and good and honest conduct, and for life, but in the event of their death, removal from county or resignation, then in that event such vacancy or vacancies shall be filled by the pastor of such J. T. and E. J. Crumbaugh Spiritualist Church, the superintendent of

Sunday school of the J. T. and E. J. Crumbaugh Church and the mayor of the city of Leroy, Illinois, being in all three (3) votes, any two of which shall be sufficient to name such trustees, who shall then be duly declared elected and shall have the same authority as if named by me: Provided, that in the event a vacancy or vacancies occur in said trusteeship at a time when there shall be no pastor or superintendent of Sunday school, then and in that event said remaining trustees shall appoint from their body some one to represent such pastor or superintendent, or both, and such person or persons so selected, together with said mayor of the city of Leroy, Illinois, shall by a majority vote of such committee fill said vacancy. Be it understood that to no further extent than filling said vacancy or vacancies in said trusteeship shall said mayor of Leroy, Illinois, or the pastor or superintendent of said church, have anything to say or do in the construction, management or control of said church or library, said management and control of said church and library, as well as the renting and care of such real estate, to be exclusively in charge of said trustees heretofore named and their successors in office. It is further provided that said trustees and their successors shall serve in such capacity without ³⁹¹ compensation for their services but shall be allowed actual expenses incurred, and which expense shall be published in full in the report made on the first day of June of each and every year."

The twelfth clause of the will is explanatory of the above, and is as follows:

"(12th.) Twelfth—Now, be it understood that I do hope it will never be questioned but that I have been in my right mind and natural mind in the making of this my last will and testament, and I have not been influenced by any person or spirits, but have only made same after many weeks of study, thought and consideration. As before expressed, I have talked and conversed freely with my dear wife, and she heartily approves and with me desires such a bequest as I have made for the purpose of establishing and endowing the aforesaid J. T. and E. J. Crumbaugh Spiritualist Church and J. T. and E. J. Crumbaugh Public Library in Leroy, Illinois, our own city and home and the city which we both love so dearly and whose future interests we have so at heart. Our property has all been made by us in our efforts to save and apply, and the closing joy of my life is the

ability of my wife and I to leave something of a permanent nature that will always be a monument in Leroy to the memory of my dear wife and I, and which we further hope will aid many to seek and find the light of the gospel and the beautiful truths uttered by the Great Letters of the past.”

The specific grounds upon which contestants sought to set aside the will, as charged in their bill, are as follows:

“That the said James T. Crumbaugh, at the time of executing the said instrument in writing purporting to be his last will and testament, was of advanced age, past seventy years, afflicted with disease and was not of sound mind and memory, but, on the contrary, was at the time wholly incapable of understanding the nature and effect of the business in which he was engaged; that at the time of the making of said will the said James T. Crumbaugh was possessed ⁸⁹² of an insane delusion as to the natural objects of his bounty and the object upon which he attempted by the said alleged will to confer his bounty; that he was insane upon certain religious subjects, and that this insanity, delusion and unsoundness of mind directly affected and controlled the distribution of his property and rendered him wholly incapable of making any just and proper division and distribution of his estate, and that such insanity, delusion and unsoundness of mind continued until the time of his death; that owing to his impaired mind, and also to his highly excited feelings in matters pertaining to spiritualism, the said James T. Crumbaugh was very liable to be unduly influenced by others, and that his mind had been purposely directed and unduly influenced by designing persons, to wit, Wesley M. Owen, Mrs. Isaac Pemberton, Mrs. Coolidge, Bang sisters, Mrs. Elizabeth J. Crumbaugh, and various other persons and spirits whose names are unknown, to make such a disposition of his property as he actually did in said instrument of writing, so that, although his mind had become so impaired as to incapacitate him to make a will, this idea of making these bequests to build and maintain a spiritualist church and library and leaving his nearest kin unprovided for, remained fixed in his mind, and that the said James T. Crumbaugh was at the time of the execution of said instrument of writing under improper restraint and undue influence from the undue acts and fraudulent practices of these designing persons, and that said undue acts and fraudulent practices consisted in obtaining control of the mind of said James T.

Crumbaugh by means of hypnotism, mesmerism, legerdemain, seances, and by working upon the already disordered mind of the said James T. Crumbaugh by means of communications from the supposed spirits, and thus directing the said disordered mind, over which, by these fraudulent means, they had obtained control, in such a way as to cause him to believe that his future welfare and happiness in the world to come depended upon his disposing of ³⁹³ his property as he by the said supposed will did attempt to dispose of it, and by causing him to believe that the spirits of his departed friends and relatives ordered him to so dispose of his property, and particularly that 'Bright Eyes,' the spirit of his dead son, advised and requested such a disposition of his said property, and that this control over his mind was secured by pretenses of friendship toward the said James T. Crumbaugh and by obtaining his confidence, to the end that by and through the means aforesaid this property could be secured for the benefit of the spiritualist church in general and for the benefit of these same designing persons who expected to profit therefrom."

The issues formed by appellant's denial, in his answer, of all that is material of the foregoing allegations were the questions submitted to and decided by the jury. So far as the issue of undue influence is concerned, considered separately from the alleged delusions of the testator in regard to spiritualism, but little need be said. While the contention of contestants on this issue is not abandoned, still the evidence introduced in support of such contention is so meager that it cannot be seriously contended that contestants' position on this point is supported to such extent as to require any extended notice by this court. It is apparent from the method of treatment in the respective briefs of the parties that the controversy in regard to Crumbaugh's testamentary capacity is regarded by both parties as the paramount and controlling issue in this case.

Upon behalf of contestants some twenty-four lay witnesses and eight physicians were introduced and testified before the jury in support of the allegations of the bill. No attempt will be made to set out the evidence of these several witnesses in detail. No necessity exists for so doing, and it would unduly extend this opinion if such course were pursued. The nonexpert witnesses testify, generally, to a personal acquaintance with the testator varying from a few months to several

years, and most of them also say that ³⁹⁴ they had conversed with the testator on the subject of spiritualism, and many undertake to reproduce the substance of such conversations, and quite a number of the witnesses for contestants express the opinion that the testator was insane on the subject of spiritualism. From the body of the testimony of the nonexpert witnesses a number of facts or occurrences are brought out upon which the witnesses base their opinions of insanity, and which form the basis of contestants' most serious contention that the testator did not possess the sound mind and memory requisite to make a valid will. The facts testified to by the witnesses for the contestants may be summarized as follows:

The testator had been a Universalist in his religious belief until five or six years before his death. His wife had been a spiritualist for many years. Prior to the time he embraced spiritualism he was an ardent Universalist and very much opposed to the views of spiritualism held by his wife. His views underwent a complete change a few years before his death, and he became a pronounced and enthusiastic spiritualist. He visited distant parts of the country to attend spiritual seances. He made one or more visits to Lillydale, New York, to attend a spiritualism seance and went to other distant points for the same purpose. On one occasion, when he returned from Lillydale, he brought a picture with him which he said was the picture of his boy that had died some thirty years before, and also a flower from the spirit land which he claimed had been given him by his son. The picture represented a full grown young man, which the testator said was the picture of his son who had grown to manhood in the spirit land, and that his name in the spirit land was "Bright Eyes." The testator said to one witness that Bright Eyes was his spirit guide and that he attended him and kept him from harm. The testator also had pictures, which he had procured at these seances, of persons who had died long before, and which pictures he claimed had been taken from the appearance of the persons at the spiritualist seances. ³⁹⁵ The testator also had a picture, made in the same way, of himself in a group with certain deceased persons. It is also shown that the testator told some of the witnesses that Bright Eyes would come to his room at night and bid him good-night; that his mother appeared to him and implanted a kiss on his cheek many years after she had died. It was also shown that the testator would frequently urge the witnesses to attend spirit-

ual meetings, assuring them that they could hold communications with their deceased relatives. It is testified to, also, that on one occasion when the testator was in a field where the witness was blowing out stumps with dynamite, a piece of one of the stumps was blown in such a way that it would have struck the deceased if he had not moved just prior to the explosion; that on another occasion the testator fell and his head came near striking a step, and that on another occasion, when the testator was burning brush, his feet became entangled in the brush and he fell and came near falling into the fire. In relating these several occurrences the testator would ascribe his deliverance from the impending danger to Bright Eyes, and told his neighbors and friends that it was Bright Eyes who saved him on these occasions from being injured. On another occasion the testator visited one of his relatives for the purpose of obtaining her signature to some papers which he desired to have executed in furtherance of an adjustment of some pending litigation between certain relatives. There was a state of ill-feeling between the witness visited, Mrs. Sarver, and her mother, and she testified that she refused to sign the papers. At this time the testator urged Mrs. Sarver to forgive her mother and become reconciled to her, and said that he had forgiven her mother for the murder of his child. He said that Mrs. Sarver's mother and her husband, who was a brother of the testator, had killed testator's only child many years before; that the manner in which they had become responsible for the death of the baby was, that they had taken a cow from testator's premises the milk of which ~~was~~ had been the baby's food, and that in consequence of being compelled to get another cow and change the milk the baby had died. The testator also said that the cow had been taken away from him in his absence and without his consent, and that he would have been glad to have bought the cow and paid more than she was worth if they had been willing to leave her with him. It is also testified to that the testator said that he had received a communication from the spirit land explaining the circumstances concerning the death of a neighbor's child, who had been burned to death in a barn. The testator said that the child procured matches from the kitchen and went to the hay-mow in the barn and buried itself in the hay and was smothered to death, and that it was not burned to death, as its parents had supposed. This alleged communication seemed to comfort

the bereaved parents, who believed the child had been burned alive.

The foregoing summary of alleged spiritual manifestations embraces substantially all that is testified to by the nonexpert witnesses in support of contestants' bill. The evidence also shows that the testator had heart disease, and that he had varicose veins, which caused one of his legs to be black from the knee down, and that he claimed he was receiving treatment for his ailments through spiritual agency, and that he was apparently better, at times, under such alleged treatment; but the evidence shows that if he received any relief at all it was only temporary, and that the general tendency was a decline in his physical condition and that he finally died of heart disease. It is shown by a number of witnesses that the testator would cry when talking about his deceased relations, and sometimes when witnesses would decline to attend spiritualist meetings he would manifest similar emotions. The substance of the foregoing facts and conditions was embraced in a hypothetical question to contestants' expert witnesses, and they answered that in their opinion, under the facts stated, the testator was insane on the subject of spiritualism.

³⁹⁷ On behalf of proponents fifty-five nonexpert witnesses and twelve experts testified. The nonexpert witnesses for proponents were laborers, mechanics, farmers, merchants, ministers and business men, who had known the testator from periods ranging from a few months to all their lives. Many of them were persons who had transacted various kinds of business with the testator. From a general view of this large mass of testimony the facts are brought out that the testator was an industrious, economical and successful business man; that he was uniformly methodical and careful in his business habits; that he attended personally to the leasing, renting and management of his farms, made contracts and settlements with his tenants, collected and marketed his rents and personally managed and superintended all the details of his business; that in addition to looking after his farming interests he was actively engaged in the banking business; that he gave personal attention to the management of the bank, was its vice-president and a member of the loaning committee, and that he actually and personally participated in the management of the affairs of the bank both before and after the execution of the will in question. These witnesses all testify

that the testator was sane, and competent to transact intelligently and understandingly any ordinary business affair. The experts who testified for proponents expressed the opinion that the testator was sane at the time he made his will, in answer to a hypothetical question embodying, in substance, the same facts included in the question propounded to contestants' experts, with facts added which were developed by proponents' testimony. Proponents also offered in evidence the articles of faith as declared in the constitution and by-laws of the Illinois State Spiritualist Association, as follows:

"First—We believe in infinite intelligence.

"Second—We believe that the phenomena of nature, physical and spiritual, are expressions of infinite intelligence.

398 "Third—We affirm that correct understanding of such expressions, and living in accordance therewith, constitute the true religion.

"Fourth—We affirm that the existence and personal identity of individuals continue after the change called death.

"Fifth—We affirm that communication with the so-called dead is a fact, scientifically proven by the phenomena of spiritualism.

"Sixth—We believe that the highest morality is contained in the Golden Rule: 'Whatsoever ye would that others should do unto you do ye unto them.' "

Dr. George B. Warne testified that he was a practicing physician and professor in Hahnemann Medical College and engaged in the general practice of medicine; that he was a spiritualist, and had been for twenty years; that he was president of the Illinois State Spiritualist Association and vice-president of the National Spiritualist Association, and a trustee of both corporations. He testified that it was a part of the spiritualistic creed, believed by spiritualists, that spirits communicate with mortals by clairaudience—that is, clear hearing, rapping, moving of tables or moving of furniture, trumpet seance, materialization, writing, spirit healing and materialization and spirit photography. He was asked, "What is the general belief of spiritualists in regard to progression after death, physically and mentally?" This question was objected to and the objection sustained.

From the foregoing statement it is apparent that there is utterly no foundation upon which a finding of general insanity of the testator can rest. In fact, it is conceded by contestants that the testator was sane on all subjects except

spiritualism. Aside from this, the evidence proves, beyond a reasonable doubt, that in all the relations and affairs of life the testator was entirely rational, and acted with that judgment, prudence and foresight usually exercised by careful and successful business men. He was able to amass a large fortune for a man engaged in his line of business, and ³⁹⁹ to invest and manage it so as to avoid losses and preserve it intact until the day of his death. The only basis to be found in this record for questioning the testamentary capacity of the testator is the fact that the testator was a believer in spiritualism and the claim that this belief amounted to an insane delusion, under the influence of which the testator made the will in question. It must be admitted, under the proofs here, that the testator was an ultraist regarding all of the doctrines embraced in the articles of faith of the spiritualist association, but that there is any evidence in this record of insanity or insane delusions which cannot be accounted for by reason of Crumbaugh's belief in spiritualism cannot be maintained. Under the law of Illinois every person of requisite age, being of sound mind and memory, has the power to devise all of his property in any way he may elect; and when the validity of a will is challenged on the ground that the testator did not possess the requisite testamentary capacity, the ultimate and final question is, Did the testator, at the time when the instrument was executed, possess the sound mind and memory required by section 1 of our statute of wills?

Courts and text-writers have often considered the question what is and what is not a proper test of testamentary capacity. In *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167, this court, after an extensive review of many authorities in this and other jurisdictions, laid down the following test: "The true inquiry in every case therefore is, Did the person whose testamentary capacity is questioned, have, at the time of making his will, such mind and memory as enabled him to understand the business in which he was then engaged and the effect of the disposition made by him of his property? If he did, he was possessed of the sound mind and memory required by the statute; and all degrees of impairment of the mental faculties, or dementia, whether senile or produced by other causes, which destroy the testamentary capacity, will disqualify, whether it has reached the stage of absolute imbecility ⁴⁰⁰ or not." Any mere mental aberration

tions resulting in the subnormal exercise of the faculties, which do not result in such impairment of the reason, judgment and memory as to render a testator unable to understand the business of making a will and the effect of the disposition to be made of his property, will not vitiate the will. The existence of delusions or delusional insanity is recognized, both by scientists and legal writers, as a form of insanity which, when shown to have existed in the testator at the time the will was executed and to have controlled its execution, will avoid the instrument. The existence of insane delusions on one subject is not incompatible with sanity on all other subjects. Contestants' position in the case in hand is that the testator was sane on all subjects except spiritualism, as to which it is contended he had an insane delusion within the legal meaning of those terms, and that the will in question was the result of such insane delusion, and is therefore void. It therefore becomes necessary to examine with some particularity whether, under the evidence, such contention can be sustained.

An insane delusion which will render the sufferer incapable of making a will is difficult to define with exact precision. A delusion is said to be a belief in a state or condition of things the existence of which no rational person would believe: *In re Forman*, 54 Barb. 274; *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267. A delusion has also been defined as "a spontaneous conception and acceptance as a fact of that which has no real existence except in imagination and persistent adherence to it against all evidence": *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *Rush v. Megee*, 36 Ind. 69; *Philadelphia Trust etc. Co. v. Drinkhouse*, 17 Phila. 23. Again, the same definition, in substance, is given in *Potter v. Jones*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161, as follows: "A conception that originated spontaneously in the mind without evidence of any kind to support it, which can be accounted ⁴⁰¹ for on no reasonable hypothesis, having no foundation in reality and springing from a diseased or morbid condition of the mind." Another form of definition conveying substantially the same meaning is given in *Middleton v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738, and is as follows: "If, without evidence of any kind, a testator imagines or conceives something to exist which does not exist in fact, and which no rational person would, in the absence

of evidence, believe to exist, he is afflicted with an insane delusion." "Whenever a person conceives something extravagant to exist which has no existence whatever but in his heated imagination, and is incapable of being permanently reasoned out of that conception, he is under an insane delusion in a peculiar, half-technical sense of the term": *Mullins v. Cottrell*, 41 Miss. 291; *Benoist v. Murrin*, 58 Mo. 307; *Stanton v. Weatherwax*, 16 Barb. 259. A person who believes supposed facts which have no existence except in his perverted imagination and which are against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, is, so far as they are concerned, under an insane delusion: *In re Shaw*, 2 Redf. 107; *In re White*, 121 N. Y. 406, 24 N. E. 935.

In setting out these various definitions we do not do so with the purpose of giving our approval to each of them, but merely to show the different forms of expression that courts have used to express the legal conception of an insane delusion. Whatever form of words is chosen to express the legal meaning of an insane delusion, it is clear, under all of the authorities, that it must be such an aberration as indicates an unsound or deranged condition of the mental faculties as distinguished from a mere belief in the existence or non-existence of certain supposed facts or phenomena based upon some sort of evidence. A belief which results from a process of reasoning from evidence, however imperfect the process may be or illogical the conclusion, is not an insane delusion. An insane delusion is not established ⁴⁰² when the court is able to understand how a person situated as the testator was might have believed all that the evidence shows that he did believe and still have been in full possession of his senses. Thus, where the testator has actual grounds for the suspicion of the existence of something in which he believes, though in fact not well founded and disbelieved by others, the misapprehension of the fact is not a matter of delusion which will invalidate his will: *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Potter v. Jones*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; *Mullins v. Cottrell*, 41 Miss. 291.

The case of *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271, is an instructive case on this phase of the doctrine of insane delusions. There the testator believed that he could locate hidden treasure by means of a small metallic ball suspended

on a thread. He spent a great deal of his time in going over the fields trying to locate the hidden metallic treasure, and holes were dug in so many places that they became a nuisance and had to be stopped. It was shown that a silver dollar hid under the carpet in a room could be located by the peculiar vibrations of the metallic ball when it was suspended over the silver dollar, and this circumstance offered some basis for the testator's belief that he could locate money buried in the ground by the same means, and the fact that there was this basis for the testator's belief, however erroneous or mistaken the conclusion drawn therefrom, distinguished the belief from an insane delusion. It is true that the bare fact that the metallic ball would indicate, by certain vibratory motions, where a silver dollar was, might be by most persons regarded as a very trifling circumstance upon which to predicate a belief that one could find treasure hidden in the earth in the same way, but it serves to show that the belief was not a spontaneous creation of a deranged mind. The following excerpt of the opinion of Mr. Justice Hadley in this case is pertinent to the question now under consideration:

403 "What tribunal occupied by finite beings is qualified to adjudge false, asserted forces of attraction and magnetism or the phenomena of mind, because incapable of demonstration, or that certain supernatural powers and influences do not exist because not in accord with an assumed standard of mental action? In all the ages of the world instruments and devices have been employed in locating minerals in the earth. The fact is notorious that there are many intelligent, conservative persons who claim the power of locating water in the earth by means of a forked stick, and thousands of wells located by them have been dug and are still being dug. It is equally a matter of common report that such a stick will point downward at particular places in the hands of some men and not in the hands of others. Many scholars and successful business men sincerely believe in spiritualism, and of being able, not by all but through the instrumentality of a few naturally qualified persons called 'mediums,' to converse with and be advised by the spirits of departed friends, and believe they recognize the voices and handwriting of the dead. Mental phenomena are as various as the hues of the autumnal forest. In Chafin's Will, 32 Wis. 557, it is said: 'Dr. Carver, a very intelligent medical witness, who had been in the western mines, testified: I have seen hundreds of men in the

mountains who came there on dreams, including lawyers, doctors and priests. Business men here in Monroe have been and searched for minerals under the direction of clairvoyants.' Others believe in Christian science; others in clairvoyance; others in the transmigration of souls, and others in witchcraft. To affirm or deny the truth of these things proves nothing, and demonstrates the individual to be neither a sage or a fool. Who shall be the judge whether the mind that accepts or rejects them is the truly sane mind? If we affirm that witches do not ride broomsticks and practice their evil arts upon us, and that there are no witches, then we have Blackstone, the father of our common law, Chief Justice Mathew ⁴⁰⁴ Hale, Coke, Sir Francis Bacon, Richard Baxter, John Wesley, Martin Luther, Cotton Mather, and a host of other eminent jurists and savants, against us; encyclopedias; Nevin's Witchcraft in Salem Village; Upham's Salem Witchcraft; Campbell's Lives of the Chief Justices, volume 2. Early in the history of our jurisprudence much difficulty, for the reason above suggested, was experienced by the courts in fixing a standard of intellect by which testamentary capacity could be determined, and legislative bodies were not inclined to relieve the courts of their embarrassment. For instance, our statute for more than a half century has provided that all persons, except infants and persons of unsound mind, may make a will. Similar statutes have long prevailed in other states of the Union and in England. In construing these statutes the courts of both this country and England were at first disposed to hold that any mind possessed of an eccentricity, aberration or erratic trend, such as amounted to an insane delusion, was not a sound mind within the meaning of the statute and hence incapable. This doctrine has long since been repudiated by the courts of England, and for the most part, at least, by the courts of this country—certainly by this state since *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9. Under the law as now settled, capacity is not determined by what one believes nor by the character of the horrid tales he can tell. The test is, does there remain in the subject an untrammelled intellect, sufficiently strong and rational to know the value and extent of his property, the number and names of those who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, and memory sufficient to carry these things in mind long enough to have his will prepared and

executed: See cases collected in *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; at page 103, 145 Ind.; page 1048, 40 N. E."

⁴⁰⁵ In the late case of *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708, we held that a belief in Swedenborgianism and an enthusiasm manifested in propagating that faith furnish no evidence of monomania, insane delusion or insanity. There the testator devised the greater portion of his property to a corporation which was organized for the sole object of printing, publishing and circulating the theological works and writings of Emanuel Swedenborg, and the only evidence of delusion was the belief of the testator in the teachings of the so-called Swedenborgian church. In disposing of the contention made we said (page 603): "The great majority of civilized human beings believe in the existence of a life beyond the grave. Based upon that belief, many religious creeds, differing widely, have been established. The fact that an individual holds any particular belief in regard to a future state of existence cannot, of itself, be evidence of an insane delusion or monomania. An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason: *Riggs v. American H. M. Soc.*, 35 Hun, 656; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Rush v. Megee*, 36 Ind. 80. We have heretofore said that 'insane delusion consists in the belief of facts which no rational person would have believed': *Nicewander v. Nicewander*, 151 Ill. 156, 3 N. E. 698; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267. Such a delusion does not exist unless it is one whose fallacy can be certainly demonstrated, for except such demonstration can be made it cannot be said that no rational person would entertain the belief. Consequently no creed or religious belief, in so far as it pertains to an existence after death, can be regarded as a delusion, because there is no test by which it can be tried and its truth or falsity demonstrated: *Gass' Heirs v. Gass' Exrs.*, 3 Humph. 278; *Buchanan v. Pierie*, 205 Pa. 123, 97 Am. St. Rep. 725, 54 Atl. 583; *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197, 40 L. R. A. 256."

⁴⁰⁶ Tested by the rules laid down in the foregoing authorities, it is clear that the testator in the case at bar was not the victim of an insane delusion, within the meaning of the law. In the light of these authorities let us examine the

occurrences which contestants rely on as showing that the testator was controlled by an insane delusion. Take, for example, the fact that the testator said that his brother and sister in law caused the death of his only child. The evidence explained what the testator meant. The child was being fed from the milk of a cow belonging to the testator's brother. It is not denied that the owner of the cow took it away from the testator's home without his consent, thereby making it necessary to feed the child upon the milk of another cow. It is not denied that the child sickened and died after the change in its food. Who should say that there was no evidence whatever for the charge that the taking away of the cow was the cause of the baby's death? It is a matter of common knowledge that physicians and careful mothers exercise great care in changing the food for infants, and the fact that the testator may have believed that the change from the milk of one cow to that of another was the cause of the sickness and death of his child has some reason in it. If there had been no such circumstance as the child being fed upon the milk of this particular cow, and the whole matter were a figment of pure imagination, then there might be some reason for saying that it originated in a disordered brain. But such is not the proof. It makes no difference, with this view, that the testator believed that the facts in relation to the death of his child had been revealed to him by spiritual communication. There is nothing connected with this circumstance showing that the testator's belief in regard to spiritual communication was any different from the belief of spiritualists in general. The preservation of the testator from threatened harm in connection with the blowing of the stump, the burning of the brush and his falling near a step are other occurrences which illustrate
407 how, in the mind of the testator, he connected events in his experience with his belief in spiritualism. His belief in spiritualism led him to account for his preservation from harm by means of spiritual guidance, while another person no more rational than Crumbaugh, but who did not believe in spiritualism, would account for the same phenomena in some other way. The testator did not imagine that he was in a field and that there was a person there blowing out stumps with dynamite and a piece of the stump was thrown in such way that it would have struck him if he had not shifted his position, but there was, in fact, such a field, and in it were stumps which were being blown out, and the testator was

there when an explosion of dynamite occurred, and it is testified to by the witness that a piece would have struck the deceased if he had not shifted his position just before the explosion. Now, all that is left of the transaction which is not susceptible of proof is the fact that the testator believed that he was led to shift his position by his guiding spirit. To hold that this is evidence of an insane delusion, when reduced to its last analysis, is to hold that a belief in spiritualism is, in and of itself, an evidence of insanity, and that no one who believes in the articles of faith as promulgated by that organization is competent to make a valid testamentary disposition of his property. There is not in this record a scintilla of evidence of insane delusions in the testator outside of the bare fact that he believed in the general doctrine of the spiritualist organization. This is not insanity, and it is no evidence of a want of testamentary capacity.

In *Whipple v. Eddy*, 161 Ill. 114, 43 N. E. 789, this court passed on the question whether a mere belief in spiritualism was evidence of insanity. It was there said (page 122): "The fact that a person is affected with insanity or labors under some delusion, believes in witchcraft, clairvoyance, spiritual influences, presentiments of the occurrence of future events, dreams, mind readings, etc., will not affect the validity of his ⁴⁰⁸ will on the ground of insanity: 1 Redfield on Wills, 79, note 9; Chaffee Will Case, 32 Wis. 557; *In re Smith*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422. Manifestly, a man's belief can never be made a test of sanity. When we leave the domain of knowledge and enter upon the field of belief the range is limitless, extending from the highest degree of rationality to the wildest dream of superstition, and no standard of mental soundness can be based on one belief rather than another. What to one man is a reasonable belief is to another wholly unreasonable, and while it is true that belief in what we generally understand to be supernatural things may tend to prove insanity under certain circumstances, it is a well-known fact that many of the clearest and brightest intellects have sincerely and honestly believed in spiritualism, mind reading," etc.

If it be said that the testator believed that Bright Eyes and the spirits of other deceased friends appeared and held communication with him, in and out of the seance-room, that the testator believed in spiritual photography and that he

had pictures of deceased persons made in this way, it may be replied that there is in this no departure from the usually accepted faith of the spiritualistic organization, as shown by the articles of faith testified to by Dr. Warne, whose testimony is wholly uncontradicted. It may be said that the testator believed that his son, who died in infancy, had grown to manhood in the spirit land, and that there is no evidence that spiritualists believe in progression or growth after death. This point is not available to contestants, since proponents asked Dr. Warne to state the belief of his association on this point, and the contestants objected and the objection was sustained. Contestants will not be permitted to profit by the absence of evidence which was excluded on their objection.

The expert witnesses who were examined for contestants expressed the opinion that the testator was insane in answer to the following hypothetical question: "Assuming, ⁴⁰⁹ Doctor, that James T. Crumbaugh, at the time he signed the supposed will in question, was seventy years of age; that for the greater part of his life he had been a farmer and very active but for the last fifteen years or more had lived in the village of Leroy; that he was, and for a number of years had been, afflicted with varicose veins, which caused his right leg to become black from his knee to the foot; that he was and for a number of years had been, troubled with heart disease, of which he died a few years later; that about three years before the drawing of the will he became a spiritualist; that previous to that time he expressed himself as being very much opposed to spiritualism; that after he became a spiritualist his social life changed; that he cared chiefly for the society of spiritualists; that when talking upon the question of spiritualism he sometimes became excited and would often break down and cry; that he thought he heard the voices of the dead in the seance-room and out of it; that he thought he saw the forms of the dead; that they stood before him and conversed with him, both in the seance-room and out of it; that his dead mother came up through the floor in the seance-room and put her arms around his neck and kissed him; that his son, whom he called 'Bright Eyes' and who died at six weeks of age, came back to him in the form of a man and patted him on the cheek; that he thought he had a spirit guide, who directed him in his affairs and who came to his bed each night and told him good-night; that these conditions existed both before and after the signing of the supposed will—what would you say as to whether or

not, at the time of executing the supposed will, he was sane or insane on the subject of spiritualism?"

It will be noted that the foregoing question embraces nothing in the physical condition of the testator that could have any tendency to affect his mental faculties. While varicose veins and heart disease are included in the question, still these ailments had nothing whatever to do with the man's mind. If Crumbaugh was suffering from physical ⁴¹⁰ ailments which had a tendency to produce mental aberrations, then such results would be as liable to appear at one time as another, and in connection with one transaction or line of thought as another. and, as we have already shown, the testator was in the full possession of all of his mental vigor before as well as during the three years intervening after the will was made and before his death. It cannot be said with any show of reason that the varicose veins of his right leg, causing it to become black from the knee to the foot, or the further fact that he was troubled with heart disease, had the remotest effect upon the testator's testamentary capacity at the time when the will was executed, or at any other time, either before or after its execution. Equally unimportant and irrelevant are the supposed facts that until three years before the making of the will testator had been opposed to spiritualism, and that afterward he cared chiefly for the society of spiritualists. With these trifling and unimportant facts eliminated from the hypothetical question, there is nothing left in it that is not embraced within the articles of faith which are believed by spiritualists generally, so that, in effect, contestants' experts testify merely that in their opinion one who believes in the doctrines of the spiritualist organization is, for that reason alone, insane on that subject. In fact, several of the physicians who testified for contestants frankly admitted that anyone who believed in spiritualism was insane on that subject. For instance, Dr. Hart says: "I would say that, regardless of his physical condition—if he had no varicose veins and no trouble with his heart—if he believed in spiritualism, as stated in the hypothetical question, I would believe from that alone that he was insane on the subject of spiritualism. Any man who believes in spiritualism as Mr. Crumbaugh believed, whether he was sound or unsound physically, I would believe him insane." Other physicians made similar explanation. Whatever weight the opinion of these learned physicians might have as tending to establish that the testator was insane because ⁴¹¹ of his be-

lief in spiritualism in a purely scientific and theoretical sense, they cannot be regarded as any evidence whatever tending to establish the existence of insane delusions, within the legal meaning of those terms. Where the proof shows, as in this case, facts which prove, beyond all doubt, that a testator was in the full possession and proper exercise of all his mental faculties, an opinion of an expert, based on a hypothetical state of facts not inconsistent with legal sanity, can have little or no weight, and in the absence of any other evidence of insanity, will not warrant the court in refusing to direct a verdict notwithstanding such opinions.

The conclusions we have reached in this case are not in conflict with our previous decisions. *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197, 40 L. R. A. 256, is a case where the jury found that the testatrix possessed testamentary capacity, but that the will was the result of undue influence, and the verdict was upheld. The belief of the testatrix in spiritualism in that case was important as bearing upon the undue influence exercised over Mrs. Merrick by Orchardson. There the evidence showed that a woman eighty-three years old, was induced to marry a spiritualist medium fifty-seven years old, and afterward to make a will in his favor, devising a large estate to him, and that she believed that she was directed to contract this unnatural marriage relation, and to make the will, by the spirit of her former husband. There is not a particle of evidence in this record that the testator ever claimed to have had any spiritual direction from Bright Eyes, or any other spiritual manifestation, directing or suggesting the making of the will in question. On the contrary, he expressly declared in the will itself that "I have not been influenced by any person or spirits, but have only made same after many weeks of study, thought and consideration," etc., thus showing, as clearing as language can make it appear that the testamentary scheme to build a church and a public library in his city—the former, especially, for the benefit of the spiritualist ⁴¹² organization and the latter for the benefit of the public in general—was a plan originated, worked out and matured in the mind of the testator, uninfluenced by any persons or spiritual manifestations whatever.

The case of *American Bible Soc. v. Price*, 115 Ill. 623, 5 N. E. 126, relied on by contestants, is not in conflict with the views we have expressed in the case at bar. It was there held that when a testator has an insane delusion in regard to one

who is an object of the testator's bounty, which causes him to make a will which he would not have made but for such delusion, such will cannot be sustained. So, also, it is held that where a person has an insane delusion in regard to his duty or moral obligation to make a will in favor of a particular person, corporation or society, and a will is the result of such insane delusion, it cannot be sustained. This is good law, and if we should strike out "insane delusion" in the above propositions and insert "religious belief" it would fit this case, but it would not then be the law. It can never be held that because a testator believes in the doctrines of a particular church, and because of his preference for the one rather than the other he makes his will with a view of promoting the interests of his peculiar denomination, this fact is to be accepted as evidence of insanity. The owner of an estate may devise it to aid the Methodist, Baptist, Presbyterian, Catholic, Universalist, Swedenborgian, or any other religious organization he may choose, or he may, if it meets his wishes, like Stephen Girard, give his property to a non-sectarian school and provide that no ecclesiastic, missionary or minister of any sect whatever shall ever hold or exercise any station or duty whatever therein, nor be allowed, even as a visitor, to enter the school or to go upon the premises, and such will is valid and will be upheld: *Vidal v. Girard's Exrs.*, 43 U. S. 127, 11 L. ed. 205.

It is a constantly recurring source of error in will cases that there is a strong inclination in courts, and especially in juries to do by their judgments or verdicts what they would ⁴¹³ have advised had the testator consulted them beforehand. One who is strongly imbued with the belief that the propagation of spiritualism is detrimental to society, and that there is nothing in the claims of its adherents that cannot be accounted for by fraud and deception on the one hand and credulity on the other, will be liable to accept any plausible theory upon which he may find a verdict correcting the supposed inequities of the testator's disposition.

The verdict of the jury in this case is entitled to the weight and consideration that is accorded to a verdict in a law case; but a verdict in a law case cannot stand without some evidence to support it. Here as we have seen, there is none, unless we are prepared to say that the bare fact that the testator was a spiritualist proves that he was insane. Such a holding would find no support in the law.

Proponents requested the court to direct a verdict in their favor, which was refused. If there was evidence requiring

the court to submit the case to the jury the refusal of the request was not error. If, upon the whole case, there was evidence fairly tending to support contestants' bill the motion was properly denied. After giving this case the careful examination which its importance requires, we are firmly convinced that there is no evidence here even raising a suspicion in our minds that the testator was not entirely sane and as competent to make a will or transact any other kind of business as the average business man. We have examined the evidence with great care, and when it is all summarized and reduced to its final results, it only proves that Crumbaugh was a believer in spiritualism; that he thought that he was doing a philanthropic work for his friends in Leroy by leaving this estate to establish this church and library, and however much one may differ from him as to the advisability of such a devise, that has nothing to do with the legal status of the will. If the testator had the capacity to make the will he had the capacity to select the beneficiaries. This he has done, and there the matter must rest.

414 The court erred in refusing to direct a verdict for proponents, for which the decree must be reversed, which is accordingly done, and the cause remanded to the circuit court for further proceedings not inconsistent with the views herein expressed.

Testamentary Capacity is not destroyed by a belief in spiritualism: *Buchanan v. Pierie*, 205 Pa. 123, 97 Am. St. Rep. 725; *Orchardson v. Coffield*, 171 Ill. 14, 63 Am. St. Rep. 211; note to *People v. Hubert*, 63 Am. St. Rep. 91.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

TAYLOR v. STRAYER.

[167 Ind. 23, 78 N. E. 236.]

DRAINAGE.—No Right to Construct an Artificial drain over the lands of another exists at the common law; and drainage statutes are given or withheld in the discretion of the legislature, and, when enacted, may be modified or repealed at the pleasure of that body. (p. 472.)

STATUTES—Effect of Repeal on Pending Action.—When a right of action not existing at the common law is given by statute, a repeal of the statute without a saving clause takes away the right of action in pending causes which have not proceeded to final judgment. (p. 472.)

DRAINAGE—Repeal of Statute.—The Repealing clause of a drainage statute providing that “the repeal shall not affect any pending proceeding in which a ditch has been ordered established,” means that only such proceedings shall be saved as have proceeded to a final order or judgment for the establishment of the ditch, and in which nothing remains but the execution of such judgment. It does not save an action which is on appeal in the circuit court from an order of the board of commissioners establishing a ditch. (p. 473.)

DRAINAGE.—In Repealing the Drainage Statutes in Indiana, the legislature intended to save all pending ditch proceedings which had not progressed to final judgment, provided the proposed ditches were not designed to, and would not, affect lakes covering ten acres. (p. 474.)

DRAINAGE—Right to Repeal Statutes.—In the exercise of the sovereign power of the state, it is the prerogative of the legislature to embody the policy of the state in such drainage laws as meets its approval, and to repeal existing laws upon that subject, unhampered by prior statutes. (p. 474.)

DRAINAGE—Repeal of Statute—Costs.—The right to recover costs in drainage proceedings ceases with the repeal of the statute authorizing the recovery, unless the right has been reduced to final judgment. (p. 474.)

DRAINAGE—Repeal of Statute.—A Plea to the Jurisdiction, based upon a statute enacted pending an appeal in drainage proceedings from the board of commissioners to the circuit court, is properly entertained after the time when ordinarily the issues would have been finally closed. (p. 475.)

John W. Hanan, Thomas R. Marshall and William L. Taylor, for the appellant.

T. A. Redmond and L. H. Wrigley, for the appellees.

²⁵ MONTGOMERY, J. Appellees commenced this proceeding by filing a petition with the board of commissioners of the county of Noble, for the establishment of a ditch beginning in said county and terminating in Lagrange county, by virtue of the provisions of sections 5655-5671 of Burns' Revised Statutes of 1901. Appellant, at the proper time, filed a remonstrance against the proposed ditch, and such proceedings were thereupon had as resulted in a judgment of the circuit court upon appeal dismissing the proceeding. This judgment was reversed upon appeal to this court: *Strayer v. Taylor* (1904), 163 Ind. 230. The cause was remanded to the lower court, and before further steps were taken therein the General Assembly passed a new drainage law and repealed all prior drainage statutes: Acts 1905, p. 456; Burns' Rev. Stats. 1905, sec. 5622 et seq. Section 14 of the new act reads as follows: "All laws and parts of laws heretofore enacted in relation to drainage are hereby repealed, but such repeal shall not affect any pending proceedings in which a ditch has been ordered established or in which there is no attempt to and which will not lower or affect any lake or body of water that has to exceed ten acres of surface at high-water mark, and such proceedings and all remedies in relation thereto shall be concluded and ²⁶ be effective in all respects as if this act had not been passed. Nor shall this act be construed to repeal any act passed at this session of the General Assembly in relation to the construction of drains and sewers in counties having a city therein of not less than fifty-nine thousand nor more than one hundred thousand population according to the last preceding United States census, nor shall this act be deemed to repeal or affect any act passed at this session of the General Assembly to preserve the fresh-water lakes of the state of Indiana at their established level and to protect them from danger of being injuriously affected or destroyed: Provided, further, that such repeal shall not affect or be con-

strued to repeal any other act upon the subject of drainage passed by the present General Assembly."

The same legislature passed a penal statute for the preservation of fresh-water lakes, section 1 of which reads as follows: "That it shall be unlawful for any person or persons, firm or corporation, to locate, dig, make, dredge, or in any manner construct, or for any court, or board of commissioners, or body of viewers or drainage commissioners, to order or recommend the location, establishment or construction of any ditch or drain cutting into or through, or upon the line of any fresh-water lake or lakes in the state of Indiana, or to locate, dig, make, dredge or in any way construct any ditch or drain, having a bottom depth lower than the present water line of such lake, within forty rods of any point on the line of such lake where the line or any portion thereof is known or ascertainable; or in case such line or any part thereof is lost and cannot be ascertained, within forty rods from high-water mark on the margin of such lake, such high-water mark to be the highest point on such margin to which such water has risen within the ten years last past": Acts 1905, p. 447; Burns' Rev. Stats. 1905, sec. 5644.

Other sections of the act made it unlawful so to interfere with the shores or banks of any such lakes as to lower the ²⁷ waters thereof, or to interfere with any levee or dam constructed for the purpose of maintaining the present water level of any such lake.

After the taking effect of these statutes appellant filed a special, verified answer or plea to the jurisdiction of the court, in which he alleged that the proposed ditch will pass through the following fresh-water lakes in Noble county, to wit: Lake Shockopee, Hardy lake, Tamarack lake, and Mud lake, and also Nauvoo lake in Lagrange county; that it will lower the present level of said lakes eight feet in depth; that appellant is the owner of a dam by which the present water level of said lakes is maintained, and that the construction of the proposed drain will destroy said dam and thereby lower the water level of said lakes eight feet; that by the construction of the proposed drainage the banks and shores of said lakes will be so cut into and interfered with as to lower the water level of said lakes; that the waters of said lakes cover areas as follows: Shockopee, one hundred and twenty acres; Hardy, seventy acres; Tamarack, one hundred and thirty acres; Mud, five acres, and Nauvoo, eighty acres; that under the drainage

act of 1905, *supra*, the rights of appellees were not preserved. but the proceedings contemplated under their petition were expressly forbidden and made unlawful, and the court is without authority further to entertain jurisdiction of the proceeding. Wherefore the court was asked to hear evidence as to the facts alleged, and to make such order as under existing laws the proof might warrant.

Appellees' demurrer to this answer for want of facts was sustained, to which decision appellant excepted. Error assigned upon this ruling presents the controlling question for decision.

No right to construct an artificial drain over the lands of others exists at common law. Drainage statutes are given or withheld in the discretion of the legislature, and when enacted may be modified or repealed at the pleasure of that body. It follows that one ²⁸ legislature cannot determine the policy of its successor and forestall action which may be deemed expedient to protect the public health or to promote the public welfare. It is altogether plain that in the opinion of the General Assembly of 1905, the public interests require the preservation of fresh-water lakes having to exceed ten acres of surface. The drainage act of 1905, *supra*, expressly repealed all existing laws upon that subject. It is a well-settled principle that when a right of action, not existing at common law, is given by statute, a repeal of the statute without saving pending actions takes away the right of action in pending causes, which have not proceeded to final judgment: *Hunt v. Jennings* (1839), 5 Blackf. 195, 33 Am. Dec. 465; *Moor v. Seaton* (1869), 31 Ind. 11; *Roush v. Morrison* (1874), 47 Ind. 414; *Board etc. v. Ruckman* (1877), 57 Ind. 96; *Rupert v. Martz* (1888), 116 Ind. 72, 18 N. E. 381.

A very eminent authority states the rule as follows: " 'The effect of a repealing statute, I take to be to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law' " : *Sedgwick on Statutory and Constitutional Law*, 2d ed., 108.

In the case of *Hunt v. Jennings*, 5 Blackf. 195, 33 Am. Dec. 465, Justice Blackford states the principle in the following words: "Whenever a statute from which a court derives its jurisdiction in particular cases is repealed, the court

cannot proceed under the repealed statute even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute."

This proceeding was accordingly terminated with the repeal of the statutes under which it was established unless it falls within the saving provisions of section 14 above set out. It is provided that the repeal "shall not affect any pending proceeding in which ²⁹ a ditch has been ordered established, or in which there is no attempt to and which will not lower or affect any lake or body of water that has to exceed ten acres of surface at high-water mark." It is insisted by appellees' counsel that the proposed ditch, having been ordered established by the board of commissioners of the county of Noble, comes within the first of said saving clauses. We cannot agree with this contention. An order or judgment which has been vacated by an appeal is in legal contemplation no order, and the statute without doubt means that only such proceedings shall be saved under this clause as have proceeded to a final order or judgment for the establishment of the ditch, and in which nothing remains but the execution of such judgment. A final judgment recovered in the courts vests the owner thereof with such interests as cannot be arbitrarily taken away, and it was entirely appropriate for the legislature to disclaim any intention to disturb such rights, and to remove all question as to the right to proceed with the construction of ditches so established and the collection of assessments made therefor. It is shown by the record that an appeal was properly taken from the order of the board of commissioners establishing the ditch in controversy to the Noble circuit court. This appeal effectually vacated the judgment of the board of commissioners. It is true that ordinarily only such issues may be tried upon appeal as were tendered before the board, and it may be that the more important questions in this case have been finally disposed of before the board; yet it is by the judgment of the circuit court that this proposed ditch must be established, if it is ever established or constructed. When a final judgment for the construction of a ditch is rendered in the circuit court upon appeal, it may be executed by that court, or it may be certified back to the board for execution according to its terms: Burns' Rev. Stats. 1901, secs. 7864, 7865; Rev. Stats. 1881, secs. 5777, 5778; ³⁰ Sharp v. Malia (1890), 124 Ind. 407, 25 N. E. 9; Bonfoy v. Goar (1895), 140 Ind. 292, 39 N. E. 56; Head v. Doehleman (1897), 148

Ind. 145, 46 N. E. 585; *Trittip v. Beaver* (1900), 155 Ind. 652, 58 N. E. 1034; *Inwood v. Smith* (1901), 156 Ind. 687, 60 N. E. 703.

It was also the expressed intent of the legislature to save all pending ditch proceedings which had not progressed to final judgment, provided the proposed ditches were not designed to and would not affect lakes of the surface area named. This saving feature is in accord with the legal principle that where new legislation does not destroy a pre-existing right or deny a remedy for its enforcement, but merely modifies the proceedings, the jurisdiction continues under the forms directed by the later act, so far as the two acts are different: *Pittsburgh etc. R. Co. v. Oglesby* (1905), 165 Ind. 542, 76 N. E. 165, and cases cited.

It is specifically alleged in appellant's answer that the proposed ditch will, if constructed, affect and lower the waters of the fresh-water lakes named, four of which are within the protection of the law. It is clear that the legislative purpose was to prevent and prohibit, under penalties, such action and results; and, taking the facts alleged as true, it is our conclusion that this proceeding, although pending, was not saved by any provisions of the repealing statute.

Appellees' counsel further invoke the saving provisions of sections 243, 248 of Burns' Revised Statutes of 1901, and sections 243, 248 of Revised Statutes of 1881. It is manifest that section 248, *supra*, has no application to any feature of this case, but only relates to penalties, forfeitures and kindred liabilities.

Section 243, *supra*, constitutes section 2 of an act of 1852, which was passed primarily to preserve rights vested and suits instituted under laws repealed by the legislature of 1852. In the revision of the statutes of 1881, similar provisions relating to existing rights of action and pending proceedings were enacted: Acts 1881, pp. 240, 389. In the exercise of the sovereign ³¹ power of the state, it was the prerogative of the legislature of 1905 to embody the policy of the state in such drainage laws as met its approval, and to repeal existing laws upon that subject, unhampered by any of the statutes mentioned.

Costs are given or withheld by statute, and the right to recover costs not already reduced to judgment must cease with the extinguishment of the right of action to which they are incident. It was clearly within the power of the legis-

lature to change the laws and prohibit the drainage of lakes, even though such change of policy and prohibitory legislation result in individual inconvenience, hardship and loss: *State v. Richcreek* (1906), 167 Ind. 217, post, p. 491; *Chicago etc. R. Co. v. People* (1906), 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L. ed. 596.

The law upon which the answer under consideration was based was enacted subsequently to the appeal from the board of commissioners, and it was proper for the circuit court to permit the filing of such answer, after the time when ordinarily the issues would have been finally closed. The facts averred therein are sufficient to bar the further prosecution of the proceeding, and the court erred in sustaining appellees' demurrer to the same.

The judgment is reversed, with directions to overrule appellees' demurrer to appellant's verified paragraph of answer, and for further proceedings in harmony with this opinion.

After a Statute is Repealed without a saving clause it is regarded, so far as concerns its operative effect, as though it had never existed, except as to matters passed and closed: *Mahoney v. State*, 5 Wyo. 520, 63 Am. St. Rep. 64. The effect of the repeal of a statute giving a special remedy is to obliterate it completely, and it must be considered as a law that never existed except for purposes of those actions commenced, prosecuted, and concluded while it was an existing law. All suits must stop where the repeal finds them; and if final relief has not been granted when the repeal goes into effect, it cannot be granted thereafter: *Vance v. Rankin*, 194 Ill. 625, 88 Am. St. Rep. 173; *Pensacola etc. R. R. Co. v. State*, 45 Fla. 86, 110 Am. St. Rep. 67.

HEASTON v. KRIEG.

[167 Ind. 101, 77 N. E. 805.]

WILL CONTEST—Estoppel on Appeal.—If the contestant of a will is required, by an order of court, made on the motion of the contestees, to attach to his complaint a copy of the will which he propounds for probate, they are estopped on appeal to deny that the copy is a proper exhibit. (p. 479.)

WILL CONTEST.—A Copy of a Subsequent Will is a proper exhibit to a complaint to annul the probate of a prior will if the plaintiff propounds such subsequent will for probate. (p. 479.)

WILL.—Presumptively a Will Speaks as of the date of the death of the testator. (p. 481.)

WILL—Conditions.—Where an Instrument, testamentary in nature, recites that in consideration of love and affection, and of the legatee caring for and supporting the testator during the rest of his

life certain property is given to the legatee, the provision for care and support is not necessarily a condition punctiliously to be performed in every particular to avoid a forfeiture. (p. 481.)

WILL.—Conditions are not Favored, and, in the absence of express terms to that effect, they will not be implied in wills unless the intent is clear. (p. 481.)

A WILL may be Defined as any Instrument, executed without the formalities required by law, whereby a person makes a disposition of his property to take effect after his death. (p. 482.)

WILL.—It is of the Essence of a Testamentary disposition of property that it be purely posthumous in operation, since during life the intent of the testator must continue ambulatory. (p. 482.)

WILL.—Contractual Provisions.—No Matter what Name the parties to an agreement may call it, or to what extent there may be contractual provisions in it, yet if a provision of a clearly testamentary character is found in the writing, and it is witnessed in accordance with the requirements of law, it may operate as a will. (pp. 482, 483.)

WORDS AND PHRASES.—The Word "Paid" is often loosely used, and always liberally construed. (p. 483.)

WILL.—The Animus Testandi does not Depend upon the maker's realization that the instrument he is executing is a will, but upon his intention to create a revocable disposition of his property to take effect after his death. (p. 483.)

WILL.—Insufficient Description for Grant in Praesenti.—A writing whereby the beneficiary shall have, at the donor's death, all the property of which she may "die seised" fails to identify any property as the subject matter of a conveyance in praesenti. (p. 483.)

WILL.—Animus Testandi, When Implied.—Where a writing contains every element of a valid will, and is incapable of operating in any other way, the animus testandi must be implied, and the instrument is not subject to be controlled by parol evidence to show a different intent. (p. 484.)

WILL.—A Writing Susceptible of Being Construed as a will and also as a deed will be construed to be a will if it is a nullity as a deed. (p. 485.)

WILL.—Testamentary Capacity—Physician as Witness.—In a proceeding to set aside the probate of a will and to probate in its place a subsequent will, the physician of the testator is incompetent to testify to matters learned through his professional relations with the decedent, although the executor of the prior will waived any objections to such competency. (p. 488.)

NEW TRIAL.—Where the Assignment of Ground for a new trial is joint, the applicants take upon themselves the burden of showing that all of the rulings embraced within a particular cause for a new trial are erroneous. (p. 489.)

Cline, Eberhart & Cline and Kenner, Lucas & Kenner, for the appellants.

Lesh & Lesh and Branyan & Feightner, for the appellee.

104 GILLET, C. J. Appellee instituted this action against John Heaston, as executor of the probated will of Esther McGlinn, deceased, and the persons named as devisees

and legatees under said instrument, to contest the validity of such will and to probate in its stead an alleged subsequent will of said decedent. The document assailed bore date of April 30, 1903, and the later writing, under which appellee ¹⁰⁵ claimed as a legatee, was signed September 1, 1903. The action resulted in a judgment revoking the probate of said former instrument and establishing as the last will and testament of said decedent the writing brought forward by appellee.

As the complaint appears in the record, there are two exhibits attached, one of which was a copy of the writing last mentioned and the other a copy of the will of John McGlinn, the deceased husband of said Esther. The exhibit of the alleged will of which appellee was the proponent is in the words and figures following, viz.:

"CONTRACT.

"This agreement is entered into by and between Esther McGlinn, of Huntington county, Indiana, and Emma L. Krieg, of Huntington county, Indiana, party of the second part, and its provisions are as follows, to wit:

"(1) Said party of the second part, Emma L. Krieg, is to take care of the first party, Esther McGlinn, during the balance of her natural life, including board, lodging, washing, furnish her with all reasonable and necessary wearing apparel, medical attendance, and nurse her in sickness as required, and furnish and do all such things as may be reasonably required for her comfort and support during her remaining years, said home to be furnished in Huntington, Indiana, the free use of the property on East Franklin street where said parties now reside being permitted for said purpose, as well as a residence for the other members of the family of the second party.

"(2) In consideration of the things to be done and furnished by said Emma L. Krieg, for and on behalf of said Esther McGlinn, and also the love and affection which each of said parties has for the other, said Esther McGlinn is to convey, by proper deed of conveyance to said Emma L. Krieg, the undivided one-half interest in lot No. 133 in the original plat of the city of Huntington, Indiana, in addition to which there shall be paid to said Emma L. Krieg, at the ¹⁰⁶ death of said Esther McGlinn, the whole of the residue of the estate, real, personal and mixed, of which she shall die seized, after deducting the following, to wit: (a) The undivided one-half

of said estate which is to go to the brothers, sisters, and descendants of said John McGlinn, deceased, by the provisions of item one of his will, which provisions are to be carried out.

(b) There shall also be deducted from the residue of the estate the sum of \$200 to be paid to John M. Krieg and a like sum—\$200—to be paid to Esther Ellen Bailey. All the remainder, however, shall be paid by the legal representative or representatives of my estate to said Emma L. Krieg.

“(3) The provisions of this instrument being required for the comfortable and reasonable support of said Esther McGlinn, the same are to supersede any and all wills or codicils which have been or may hereafter be made by her.

“Witness our hands this 1st day of September, 1903.

“ESTHER McGLINN.

“EMMA L. KRIEG.

“This instrument was signed by the parties thereto in our presence and signed by us in their presence, this 1st day of September, 1903.

“U. S. LESH.

“EBEN LESH.”

The will of said John McGlinn, according to the copy thereof which is made an exhibit to the complaint, gave to his wife all of his property for and during her natural life, and, in the following language, it gave her authority to dispose of the same:

“I do hereby authorize her, with advice of my executors hereafter named, to sell and with said executors to execute all necessary titles, papers, deed, and contract for whatever portion of said property my said wife may deem necessary for her support and comfort, and with the further power to dispose of the one-half of the residue of surplus if any shall remain at her death by will or executory devise, and I will and direct that the other half of said residue shall be equally divided amongst my brothers and sisters, if living, and if deceased then to their descendants.”

¹⁰⁷ The first assignment of error is based on the overruling of a demurrer to the complaint, and the first objection which appellants' counsel make to said pleading is thus stated by them: “The exhibits to the complaint are not parts thereof, and hence Emma L. Krieg is not a party in interest, and cannot legally contest the will of Esther McGlinn.” It is alleged in the complaint, among other things, “that on September 1, 1903, said Esther McGlinn duly revoked said alleged will by

an instrument in writing, signed by her and attested and subscribed by two competent witnesses, as required by law, a copy of which is hereto attached and made a part hereof and referred to as exhibit A." It is further alleged "that the plaintiff is a foster-daughter of said decedent, and by the terms of her last will is named as a legatee, and as such is entitled to maintain this action." The specific relief prayed for is "that the probate of said will be annulled, and that the one herein proposed be admitted to probate in lieu thereof." Appellants admit in their brief that the copy of the will of John McGlinn, deceased, was attached to the complaint by order of the court, on their motion, so, although it is not necessary to meet the objection stated to examine said exhibit, we may say in passing, as applied to other objections urged against the complaint, that appellants, by their conduct, are estopped to deny that the copy of that will is a proper exhibit.

As to the copy of the instrument of September 1, 1903, appellants' counsel cite, as authority for the proposition that said copy is not a proper exhibit, certain decisions of this court to the effect that in an action to contest a will a copy of the instrument in contest cannot properly be attached as an exhibit. These cases are not in point, for the copy in question is the one under which appellee claims; the fact that she made it an exhibit tends to show, as does also the general structure of the complaint, that her effort in part was to procure the probate of said ¹⁰⁸ instrument. She had a right, in the action to contest the earlier will, which she claimed had been revoked by the subsequent instrument, to propound said instrument for probate, if it amounted to a will. So in the strictest sense of the term it was the foundation of her cause of action. It was not mere evidence of a right; it was her right of action. Her complaint in that respect would not have been good unless she had incorporated the copy in such pleading, or made it an exhibit. The rule of the code (Burns' Rev. Stats. 1901, sec. 365; Rev. Stats. 1881, sec. 362) that where a pleading is founded on a written instrument the original or a copy thereof must be filed is imperative, and in this respect the rule of practice in this state is stricter than at common law: *Price v. Grand Rapids & I. R. Co.* (1859), 13 Ind. 58. It was held in *Watt v. Pittman* (1890), 125 Ind. 168, 25 N. E. 191, that there are cases in which it is proper to make an instrument an exhibit; although it is not in the

strict sense the foundation of the action, as in a complaint to construe a will, and so here, upon the same principle, it would seem that the making of the instrument of revocation an exhibit was authorized, so far as the complaint attacked the former will, to enable the court to determine from the terms of the subsequent instrument—and all of them would have to be examined—whether there was a sufficient revocation of the will in contest.

Appellants' counsel further contend that the writing of September 1, 1903, is conditional, and that therefore appellee ought to have alleged performance upon her part. It is to be observed that the things which appellee was to do according to the terms of said instrument were all to be performed in the lifetime of the decedent, and as the instrument, if a will, continued revocable until her death, no estate passed to which her stipulations could attach, either as conditions precedent or conditions subsequent. That the instrument, at least in part, was a will in law we shall attempt to show hereafter. If ¹⁰⁰ the document were a deed, under which a title would pass, the protection of the interests of the grantor might incline the court to construe the statement of the agreement to support as a condition, but presumptively a will speaks as of the date of the death of the testator. It is especially unlikely that in a will a testator, who continues throughout the master of his own discretion, would attempt to protect himself by a condition precedent. This takes the case out of the range of cases in which conditions have been implied for the want of an effectual remedy in the grantor: *Richter v. Richter* (1887), 111 Ind. 456, 12 N. E. 698. Besides, the consideration for the execution of the instrument in question by the decedent is stated to be love and affection, as well as the things promised to be done by the other party, so it would seem, at least if it be assumed that the residuary clause is a will, in which it is presumed that the testator's bounty is an element, that the case comes within the rule that in the absence of express words a condition is not to be implied from the mention of a consideration if it does not go to the whole consideration: 2 *Parsons on Contracts*, 5th ed., 527; *Duke of St. Albans v. Shore* (1789), 1 H. Black. 271, and note, p. 273, containing *Boone v. Eyre* (1777), and see latter case in note (t) to *Boone v. Eyre* (1779), 2 W. Black. *1312, *1314; *Pordage v. Cole* (1607), 1 Wms. Saund. 320; *Ayer v. Emery* (1867), 14

Allen, 67; Gould v. Brown (1856), 6 Ohio St. 538. Conditions are not favored, and, in the absence of express terms to that effect, they will not be implied in wills unless the intent is clear: Murphey v. Brown (1902), 159 Ind. 106, 62 N. E. 275. Here, as we shall hereafter show, the provisions concerning the residuary estate can reasonably be disentangled from the other provisions of the instrument, and as it may be satisfied in any event by treating the stipulations of appellee as covenants, or by the assumption that the statement of the portion of the consideration which was valuable was in ¹¹⁰ the nature of a recital, and indulging, as we may, the presumption that it was really the intention of decedent to make appellee, to a large extent at least, the recipient of her bounty, we deem it clear that we should not treat the provisions concerning support as conditions which were punctiliously to be performed in every particular to avoid a forfeiture.

Appellants' counsel further urge in support of their demurrer that the instrument of September 1, 1903, was a contract, and that, therefore, decedent was not authorized to dispose of the property she received from her deceased husband, by means of such an instrument. As appellee made the copy of the will of John McGlinn an exhibit pursuant to the order of the court, as moved by appellants, and as said will was not a proper exhibit under the code, we are of opinion that the question as to Esther McGlinn's authority to execute said instrument in disposition of the estate is not presented by the demurrer. The question does arise upon the evidence, however, and with the preliminary statements that at the time of the execution of the writing in question said decedent was eighty-two years of age, that she had none but collateral kindred, that the appellee had been reared by decedent, that they had lived together much of the time afterward, that decedent had received under her husband's will about \$17,000 worth of property, and that she had no further estate, we proceed to the consideration of the law question presented.

It appears from the English authorities prior to the enactment of the English wills act of 1837 (1 Vict., c. 26) that there was judicial sanction for the probating of almost every kind of document whereby property could be disposed of or affected, among which we may enumerate deeds, contracts, promissory notes, bills of exchange, letters and diary entries:

Castor v. Jones (1882), 86 Ind. 289, and cases cited; note to Ferris v. ¹¹¹ Neville (1901), 89 Am. St. Rep. 480; note to Burlington University v. Barrett (1867), 92 Am. Dec. 376; Hunt v. Hunt (1828), 4 N. H. 434, 17 Am. Dec. 434; 30 Am. & Eng. Ency. of Law, 2d ed., 573, and cases cited. A will may be defined, with sufficient accuracy for present purposes, as any instrument, executed with the formalities required by law, whereby a person makes a disposition of his property to take effect after his death: 1 Redfield on Wills, 4th ed., *5; Habergham v. Vincent (1793), 2 Ves. Jr. 204; McCarty v. Waterman (1882), 84 Ind. 550; Robinson v. Brewster (1892), 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; Cover v. Stem (1887), 67 Md. 449, 1 Am. St. Rep. 406, 10 Atl. 231; note to Ferris v. Neville, 89 Am. St. Rep. 480. It is, of course, essential to distinguish between such provisions and those in which the beneficiary takes some interest, vested or contingent, upon the execution of the instrument. It is of the essence of a testamentary disposition of property that it be purely posthumous in operation, since during life the intent of the testator must continue ambulatory.

It affords no objection whatever to the testamentary character of an instrument that it contains provisions of a contractual nature: Habergham v. Vincent (1793), 2 Ves. Jr. 204; Green v. Proude (1675), 1 Mod. 117; Hixon v. Wytham (1675), 1 Ch. Cas. 248, Finch, 195; Thorold v. Thorold (1809), 1 Phil. Ecc. 1; Masterman v. Maberly (1829), 2 Hagg. Ecc. 235; Lautenshlager v. Lautenshlager (1890), 80 Mich. 285, 45 N. W. 147; Armstrong v. Armstrong (1874), 4 Baxt. 357; Jordan v. Jordan's Admr. (1880), 65 Ala. 301; Gage v. Gage (1841), 12 N. H. 371; Symmes v. Arnold (1851), 10 Ga. 506; Turner v. Scott (1866), 51 Pa. 126. Of course, as respects the same subject matter, a document could not be a contract, passing an interest in the property, and a will, any more than two objects could occupy the same space at the same time. The very attaching of rights ¹¹² in the property by another precludes the exercise of that continued authority upon the part of the original owner which is of the essence of testamentary power. But we think it may be affirmed, as a just deduction from the cases, that no matter by what name the parties may call their agreement, or to what extent there may be contractual provisions in it, yet if a provision of a clearly testamentary character is found in

the writing and it is witnessed in accordance with the requirements of law, it may operate as a will: *Habergham v. Vincent* (1793), 2 Ves. Jr. 204; *Green v. Proude* (1675), 1 Mod. 117; *Castor v. Jones* (1882), 86 Ind. 289; *Gage v. Gage* (1841), 12 N. H. 371; *Reed v. Hazleton* (1887), 37 Kan. 321, 15 Pac. 177; *Turner v. Scott* (1866), 51 Pa. 126.

As to the *animus testandi*, concerning which appellants' counsel raise a question, we have to observe that a case in which a testamentary provision clearly appears is to be broadly differentiated from a case arising out of some ambiguous act, as the indorsement of a promissory note. In the former case parol evidence would be wholly unnecessary, for the *animus testandi* does not depend upon the maker's realization that the instrument he is executing is a will, but upon his intention to create a revocable disposition of his property to take effect after his death: *Kenney v. Parks* (1899), 125 Cal. 146, 57 Pac. 772.

In the instrument before us, the provision of item 2, commencing with the words, "in addition to which there shall be paid to said Emma L. Krieg, at the death of said Esther McGlinn, the whole of the residue of the estate, real, personal and mixed, of which she shall die seised," clearly looked forward to the death of the latter, and may be given a testamentary operation. The word "paid" is one which is often loosely used, and is always liberally construed: *Sheets' Estate* (1866), 52 Pa. 257, 258. At the best, appellants' counsel cannot escape the proposition that aside from the interest in the house and lot which decedent undertook to convey by deed, the ¹¹³ provision that appellee should have at decedent's death the property of which she should "die seised" wholly failed to identify any property as the subject matter of a conveyance in *praesenti*. If decedent had refused to continue to live with appellee, and had, with the advice of her husband's executors, conveyed property to provide for her support, or if, having procured their consent, she had exercised her undoubted discretion to dispose of property to provide herself with comforts which it would have to be said that appellee's undertaking, in view of her scale of living, did not contemplate should be furnished, the latter could not have recovered such property upon decedent's death. We quote as illustrative of the force of this the following observations of the court in *Brewer v. Baxter* (1870), 41 Ga. 212, 5 Am. Rep. 530: "The paper writing set forth

in the record conveys only such of the described property as the maker thereof 'may die possessed of'; no present interest in the property was conveyed to the three sons, and until the death of the maker of the instrument, no one could know what portion of the property described therein he would die possessed of. Consequently, the instrument conveyed only such portion of the described property as he might be possessed of at the time of his death, and is, in law, a testamentary disposition of the property, to take effect at the death of the maker of the instrument, and if legally executed, may be proved as such in the proper court": See, also, *McCarty v. Waterman* (1882), 84 Ind. 550; *Reed v. Hazelton* (1887), 37 Kan. 321, 15 Pac. 177.

As to the undertaking in item 3, whereby decedent undertook to revoke any subsequent will, it may be pertinently asked whether the provision against revocation does not have quite as much tendency to show that the absolute title to the property was treated by the parties as remaining in said decedent as it does to show that an interest was attempted to be conveyed, but, as we have already pointed out, there yet remained a way by ¹¹⁴ which she could disappoint the expectations of appellee by a conveyance inter vivos, so that decedent would not "die seised" of the property. Besides, it is to be remembered that if said instrument should not be construed as a will, it would work the overthrow of the provisions in favor of John M. Krieg and Esther Ellen Bailey, who could only take as legatees. This re-enforces the view that the instrument should be construed as testamentary.

As the writing in question contains every element of a valid will, and was incapable of operating in any other way, we are of opinion that the animus testandi must be implied, and that the instrument (supposing that it had been regularly executed) was not subject to be controlled by parol evidence tending to show any different intent. There was evidence, however, from which the jury was justified in finding that the paper was intended as a will.

But supposing that by putting together the various provisions of the writing it could be said that in its entirety it amounted to an expression, even if somewhat incoherent, of an intent to pass an interest in the property, yet, as must be admitted, there is room for the other construction, and the question then arises as to which should prevail. And at this point we may suggest that appellants occupy the peculiarly

unfortunate position of contending for a particular interpretation, not for the purpose of substantially carrying out the intention of the parties to the instrument, but to the end that the provisions thereof may be extirpated, root and branch. Now, it is evident, since the decedent had authority to dispose of one-half of her deceased husband's estate by will, that an interpretation which would nullify the instrument, which she caused to be duly witnessed according to the law of wills, is not to be adopted if it can reasonably be avoided. "*Ut res magis valeat quam pereat*"—that the thing may prevail, rather than be destroyed—is a sound rule of construction,¹¹⁵ which is frequently adopted by the courts to effectuate the intention of parties to written instruments. In *Roe v. Tranmarr* (1757), Willes, 682, 3 Smith's Lead. Cas., 9th Am. ed., 1780, a deed which could not operate as a release, because it attempted to convey a freehold in futuro, was upheld, by invoking the above rule, as a covenant to stand seised, thus giving the instrument an operation by the statute of uses, although it was intended to be a deed at common law. In delivering the opinion of the court, Willes, Lord Chief Justice, after calling attention to the rules in respect to the exposition of deeds, as laid down in *Shepherd's Touchstone*, and to the declaration of Lord Hale, that the judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties, adds: "The judges in these later times (and I think very rightly) have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it." The learned annotator of Smith's Leading Cases, in his opening comment upon said case, says: "The principle which it carries out, and is usually cited to illustrate, is one of the highest importance, and is, indeed, the main one upon which the construction of every written instrument hinges."

The doctrine embodied in the rule of construction we are considering has frequently been recognized in will cases. Thus, in *Habergham v. Vincent* (1793), 2 Ves. Jr. 204, which was decided after extended argument and much consideration, Wilson, J., said: "The general rule is, that, when a man has expressed a clear intention to dispose of his estate, and has taken an ineffectual mode of doing it, yet, if the instrument can be construed in another manner so as to ef-

fectuate his intention, the ceremony is matter of form; and the substance shall be carried into execution, if it may by law.¹¹⁶ So here, though the testator has called this a deed, yet, as the intention was to complete what was incomplete by the will, as it is in writing, and signed, and as to some purposes, perhaps to all, it may have a legal operation, if testamentary, in order to sustain the intention it is fair so to consider it; and I do not know any rule that stands in the way." In *Milledge v. Lamar* (1816), 4 Desaus. 617, James, J., in considering whether an instrument in form a deed, and which would be void as such, could operate as an executory devise, said: "But as an instrument in writing, solemnly executed, this court appears bound to give it some operation. Now, the doctrine is, that when a man has expressed clearly his intention to dispose of his estate, and has taken an ineffectual mode of doing it, yet if the instruments can be construed in another manner, so as to effectuate his purpose, the ceremony is matter of form, and the substance shall be carried into execution, if it may by law. And although this paper has the form of a deed, yet as it was intended to take effect at the death of the testator, and is ratified by his will, it may be considered as testamentary." In the same case, Desaussure, J., said: "The instrument under consideration may be so construed, if it be necessary to do so, in order to give effect to the intention of the maker. It is a leading object with courts of justice to give effect to the intention of parties, both in their deeds and wills: 3 Bacon's Abridgment, 393. That great and virtuous magistrate, Lord Hale, said in the case of *Pibus v. Mitford* [(1669), 1 Vent. 372], (cited in 1 Ves. Sr. 153), 'that we ought to serve the intent if we can, as the best expositor we can go by'": See, also, *Thorold v. Thorold* (1809), 1 Phil. Ecc. 1; *Masterman v. Maberly* (1829), 2 Hagg. Ecc. 235; In the *Goods of Morgan* (1866), L. R. 1 P. & D. 214; *Thompson v. Johnson* (1851), 19 Ala. 59; *Sharp v. Hall* (1888), 86 Ala. 110, 11 Am. St. Rep. 28, 5 South. 497; *Crocker v. Smith* (1891), 94 Ala. 295, 10 South. 258, 16 L. R. A. 576; *Crain v. Crain* (1858), 21 Tex. 790; Broom's Legal¹¹⁷ Maxims, *640; *Shepherd's Touchstone*, 82, 83; 1 *Williams on Executors*, 7th Am. ed., 150.

Cases may be found in which courts have exhibited a like anxiety to uphold as deeds instruments which could not operate as wills. Such cases and those we have above re-

ferred to are like emanations of the principle "that unless an instrument, which has been fully executed, from every point of view seems to be a nullity, it will not be intended that the parties meant that it should be invalid, and some effect will, if possible, be given to it": *Spencer v. Robbins* (1886), 106 Ind. 580, 5 N. E. 726.

The intent to execute the power conferred by the will of John McGlinn appears on the face of the instrument, and it is to be implied from the circumstances: *Rinkenberger v. Meyer* (1900), 155 Ind. 152, 56 N. E. 913, and cases cited.

Appellants, by cross-complaint, attacked the execution by decedent of the instrument of September 1, 1903, on a number of grounds, among which it is sufficient to mention unsoundness of mind and undue influence. Upon the trial, appellants, in an appropriate manner, offered the testimony of two physicians as to the physical and mental condition of said decedent a number of months subsequent to the signing of said instrument, and it was sought to prove that such condition must have existed at the time in question. It appeared that the knowledge of said physicians as to decedent's condition was obtained while treating her professionally, but John Heaston, as executor of the will of April 30, 1903, attempted to waive the objection that they were incompetent. Complaint is made that the court refused to permit appellants to prove by said physicians the facts within their knowledge. The statute which makes physicians incompetent to testify to matters concerning their patients which they learn by reason of their professional relation contains no qualifying terms. As the patient may waive the privilege, since it is ¹¹⁸ for his benefit, we recognize as proper the holdings of this court that the executor of the patient who enjoyed such privilege may, for the purpose of upholding his attempted testamentary disposition of his property, waive the privilege which the statute confers, but since in this case the attack was solely upon the testamentary instrument of September 1, 1903, we should regard it as a perversion of said holdings to attempt to apply them to this case. It appears from the record that the wife of said Heaston was a legatee under the former will, and he was the principal witness on behalf of appellants. It is to be remembered that upon the making of the formal proof as to the execution of the instrument, it became incumbent upon appellants to show that what was *prima facie* the act of decedent was not such in

law. Had this contest come after the formal probating of the instrument of September 1, 1903, and the issuing of letters of administration with the will annexed, the holder of such letters would have been charged with a duty of seeking to maintain said instrument, and he alone, in view of the posture of the case, could have waived the privilege of his decedent. The fact that these steps were not taken made no difference so far as the former will was concerned. Those who claimed under it could not waive the objection to a disqualified witness in order that they might overthrow what was *prima facie* the valid act of the decedent, for whose benefit the statute had interposed the bar. It was not a race of diligence as to who could first procure the probating of the will which he possessed, so as to put the other party on the defensive. A waiver must have its basis in the right of the decedent, and in such a case as this it can only be invoked by the executor who is seeking to support what *prima facie* at least was the valid act of his testator: See *Towles v. McCurdy* (1904), 163 Ind. 12, 71 N. E. 129; *Brackney v. Fogle* (1901), 156 Ind. 535, 60 N. E. 303.

In the portion of appellants' brief devoted to the argument of the cause, their counsel complain of the action of ¹¹⁹ the court in excluding evidence that William Krieg, the husband of appellee, stated in the presence of the executors of John McGlinn's estate and certain lawyers whom they were consulting as to the right of said Esther to enter into such an agreement as the one in question, that he and his wife desired the whole of the estate for keeping said decedent. The competency of this evidence is claimed on the ground that it was a circumstance tending to show undue influence. While we recognize the legal proposition that such influence may, in some circumstances, be made out without direct proof of the actual exercise thereof, yet we seriously doubt whether there was enough evidence to warrant the submission of such question in this case: *Teegarden v. Lewis* (1896), 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; *Slayback v. Witt* (1898), 151 Ind. 376, 50 N. E. 389. It also appears to us that appellants in other instances had the benefit of the ultimate facts sought to be proved. But granting that there was technical error in excluding the evidence, appellants are not entitled to a reversal on account thereof, because of the state of the record. The rulings were respectively made the tenth, thirteenth, fourteenth and seven-

teenth grounds for a new trial. The practice was pursued in each instance of setting out in the motion what purported to be a transcript of a number of questions, together with the offers to prove and the rulings of the court, and where such answers were permitted, they are also set out. In each instance the assignment of the ground for a new trial was joint, and appellants have therefore taken upon themselves the burden of showing that all of the rulings embraced within a particular cause for a new trial were erroneous: *Cincinnati etc. R. Co. v. Madden* (1893), 134 Ind. 462, 34 N. E. 227; *Lawrence v. Van Buskirk* (1895), 140 Ind. 481, 40 N. E. 54; *Indiana etc. R. Co. v. Snyder* (1895), 140 Ind. 647, 39 N. E. 912; *Masterson v. State* (1896), 144 Ind. 240, 43 N. E. 138; *Sievers v. Peters, B. & Lumber Co.* (1898), 151 Ind. 642, 50 N. E. 877, 52 N. E. 399. Each ground for a new trial, as a joint one, may be defended ¹²⁰ on the ground either that a question embraced therein was leading or called for a conclusion or for matter prima facie privileged, or that it was followed by legal argument, instead of an offer to prove, and in one instance, concerning which complaint is made of the ruling on the motion for a new trial, the motion states that the objection to the exclusion of the evidence was overruled, instead of sustained. Counsel have also failed to comply with the rules of this court both in respect to pointing out the page and line where the particular ruling may be found, and in failing to state the proposition under the points-and-authorities subdivision of their brief, as required by rule 22 of this court. It is further objected that the court erred in permitting witnesses who had long been acquainted with said decedent to testify as to their opinion that she was of sound mind. The particular objection which is thus advanced is that said witnesses did not state facts sufficient to be made the foundation of an opinion as to the mental condition of said decedent. There is no merit in these objections, especially in view of the fact that the witnesses were called for the purpose of proving that said decedent was sane. They certainly revealed a sufficient acquaintance with her so that the court was authorized to submit the question as to the weight of their opinion to the jury: *Colee v. State* (1881), 75 Ind. 511; *Ryman v. Crawford* (1882), 86 Ind. 262; *Goodwin v. State* (1884), 96 Ind. 550; *Blume v. State* (1900), 154 Ind. 343, 56 N. E. 771.

The question whether the court erred in the giving and refusal of particular instructions is discussed in the brief of appellants at some length. The point is made, however, by the other side that all of these matters are included within a joint assignment of errors, and we are of opinion that this is the case: *Kackley v. Evansville etc. R. Co.* (1893), 7 Ind. App. 169, 34 N. E. 532. As it is not claimed that the court erred in all of these rulings, we ¹²¹ are not called on to consider the particular questions concerning the instructions which counsel have sought to raise: *Conrad v. State* (1896), 144 Ind. 290, 43 N. E. 221; *Masterson v. State* (1896), 144 Ind. 240, 43 N. E. 138; *Lawrence v. Van Buskirk* (1895), 140 Ind. 481, 40 N. E. 54; *Cincinnati etc. R. Co. v. Madden* (1893), 134 Ind. 462, 34 N. E. 227; *Moore v. Orr* (1894), 10 Ind. App. 89, 37 N. E. 554.

Finally, it is urged that the verdict was contrary to the evidence. We have already considered every question that was really deserving of consideration which was presented under the above ground for a new trial. Beyond that we may state that appellee was only called on to make formal proof in order to sustain her case, and even within the field of controversy as to the due execution of said will, the jury was wholly justified in returning the verdict in favor of appellee.

Judgment affirmed.

To Constitute an Instrument a Will, it is not necessary that it should assume any particular form, or that it should be expressed in any particular words: See the note to *Ferris v. Neville*, 89 Am. St. Rep. 486, on what constitutes a testamentary writing. For subsequent cases to the same effect, see *Gump v. Gowans*, 226 Ill. 635, 117 Am. St. Rep. 275; *Kerr v. Girdwood*, 138 N. C. 473, 107 Am. St. Rep. 551; *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614.

Conditions Subsequent are discussed in the note to *Ecroyd v. Coggershall*, 79 Am. St. Rep. 747. *Conditions precedent* are discussed in the note to *Brennan v. Brennan*, 103 Am. St. Rep. 366.

STATE v. RICHCREEK.

[167 Ind. 217, 77 N. E. 1085.]

BANKING—Statutory Regulation.—At the Common Law an individual could engage in the banking business at pleasure, but the state has power to regulate and restrain the exercise of that right. (p. 493.)

BANKING—Reasonableness of Statutory Regulations.—The question as to what regulations of the banking business are proper and needful is primarily for the legislature to decide, but the courts, if called upon, must finally determine whether the regulations are in harmony with constitutional guaranties. (pp. 493, 494.)

BANKING—Constitutionality of Regulation.—A statute providing that the "real estate, bank furniture and fixtures" of unincorporated banks shall not constitute more than one-third of their entire capital, does not deprive such banks of their property without due process of law, nor abridge their privileges and immunities in contravention of the fourteenth amendment. (p. 496.)

BANKING—Constitutionality of Regulation.—A statute providing that no unincorporated bank shall do business unless it has property of the cash value of ten thousand dollars is constitutional. (pp. 498, 499.)

BANKING—Constitutionality of Regulation.—A statutory provision that the proprietors of unincorporated banks shall take oath that their individual net worth is at least double the amount of capital paid into the bank is constitutional. (p. 499.)

BANKING—Constitutionality of Regulation.—A statutory provision requiring an individual, or one member of a firm, conducting a banking business, to be a resident of the state, is constitutional. (p. 500.)

CONSTITUTIONAL LAW.—The Exercise of the Police Power is subject to the supervision of the courts, but police regulations may not be declared void merely because deemed contrary to natural justice and equity, but only because they violate some constitutional right. (p. 500.)

Charles W. Miller, attorney general, C. C. Hadley, W. C. Geake, L. G. Rothchild and Rowland Evans, for the state.

D. P. Baldwin, T. E. Howard and W. T. Thornton for the appellee.

²¹⁹ MONTGOMERY, J. Appellee was charged by affidavit with having transacted a banking business on July 3, 1905, and for two days prior thereto, and with having used the words "bank," "banker," and "banking" in connection with said business without having filed with the auditor of state a detailed statement under oath as required by the act of March 4, 1905 (Acts 1905, p. 182; Burns' Rev. Stats.

1905, secs. 2994a-2994j), entitled, "An act to regulate the business of banking by individuals, partnerships and unincorporated persons." The affidavit was quashed, upon appellee's motion, for the alleged reason that it did not contain facts sufficient ²²⁰ to constitute a public offense; and from that decision the state appealed.

The first three sections of the statute upon which this prosecution was based read as follows:

"Section 1. That every partnership, firm or individual transacting a banking business within this State or using the word bank, banker or banking in connection with his or its business shall be subject to the provisions of this act.

"Section 2. That from and after July 1, 1905, it shall be unlawful for any partnership, firm or individual to transact a banking business in this State unless such partnership, firm or individual has property of the cash value of at least \$10,000. Such property shall be in money, bank furniture and fixtures or real estate for the conduct of the business of such bank, all to be set apart and kept good and unimpaired for the security of creditors of any such bank, and provided that the real estate, bank furniture and fixtures shall not constitute more than one-third in amount and value of the entire capital of such bank.

"Section 3. Every partnership, firm or individual now transacting or hereafter desiring to transact a banking business in this State, shall, under oath, file with the Auditor of State, a full, complete detailed statement of First. The name of the bank or proposed bank. Second. A copy of the articles of copartnership and agreement if a copartnership under which the business of the bank is being or is to be conducted, which shall be executed and acknowledged by all the parties interested therein, and at least one of whom shall be at all times a resident of the State of Indiana. If a banking business is being or is to be transacted or carried on by an individual, such individual shall at all times, while in such banking business, be a resident of the State of Indiana and the statement herein required shall so show. Third. The county and city or town in which the bank is to be located and the business carried on. Fourth. The amount of the capital paid into the business, ²²¹ and to be kept and maintained at all times in the business. Fifth. A statement that the responsibility and net worth of the individual members of such firm, partnership or

individual is equal to an amount at least double the amount of the capital paid into such bank as herein provided. Sixth. If not disclosed in the partnership agreement, then the names of the officers, agents or employés in the active charge of and management of the business of the bank. Every partnership, firm or individual now doing a banking business in this State shall on or before July 1, 1905, file with the Auditor of State a detailed statement as provided herein."

No formal objection to the affidavit has been suggested, but the assault is directed solely against the act upon which it is founded. It is charged that the provision of section 2, forbidding more than one-third of the capital of the bank to be invested in real estate, bank furniture and fixtures for the conduct of the business of such bank, and the second and fifth subdivisions of section 3 of the statute, are invalid and unconstitutional.

The right of banking, in all its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded by counsel, and it is unquestionably settled, that the sovereign authority of the state may regulate and restrain the exercise of such right: *Bank of Augusta v. Earle* (1839), 13 Pet. *519, *596, 10 L. ed. 274; *Blaker v. Hood* (1894), 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854; *State v. Woodmansee* (1890), 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420; *Curtis v. Leavitt* (1857), 15 N. Y. 9, 52; *Attorney General v. Utica Ins. Co.* (1817), 2 Johns. Ch. 371; *People v. Utica Ins. Co.* (1818), 15 Johns. 358, 8 Am. Dec. 243; *People v. Bartow* (1826), 6 Cow. (N. Y.) 290; *Nance v. Hemphill* (1840), 1 Ala. 551; *State v. Williams* (1852), 8 Tex. 255; *State v. Stebbins* (1828), 1 ~~222~~ Stew. (Ala.) 299; 1 *Morse on Banks and Banking*, 4th ed., sec. 13; *Zane on Banks and Banking*, secs. 9, 10.

The quasi public nature of the banking business, and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the state, clearly bring it within the domain of the internal police power, and make it a proper subject for legislative control. Bankers invite general deposits primarily for their own profit, and usually obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion, and fraud, of affording efficient means of detecting irregular practices, and of learning the true financial condition of the bank, and the

necessity of preserving the confidence of patrons in its solvency, and of protecting their interests in case of insolvency, justify inspection and control by the state. When the sovereign people of a state, acting through the legislature, find such police regulation necessary to protect public health, safety or morals, to prevent fraud or oppression, or to promote the general welfare, the power to act is supreme, subject only to such limitations as are imposed by the fundamental law. The question as to what regulations are proper and needful is primarily for legislative decision, yet when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties: *Republic Iron & Steel Co. v. State* (1903), 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136.

Appellee's learned counsel frankly concede that the business of banking, whether conducted by a corporation or by individuals, is a legitimate subject of inspection and regulation by law under the police power; and further, that the provisions of section 2 of the act under consideration, making it unlawful to transact a banking business under ²²⁸ this act on a capital of less than \$10,000 in money, bank furniture, fixtures and real estate, all to be set apart and kept good for the security of creditors of the bank, are wise and salutary. They earnestly contend, however, that the proviso "that the real estate, bank furniture and fixtures shall not constitute more than one-third in amount and value of the entire capital of such bank," contravenes the constitutional guaranty that "no man's property shall be taken by law without just compensation" (Const., art. 1, sec. 21), since many private bankers already in business have furniture and fixtures and real estate of more than half, and in some cases nearly equal to, the value of the whole banking capital. It is further argued that this clause violates section 23, article 1 of the state constitution, which provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges and immunities which, upon the same terms, shall not equally belong to all citizens," inasmuch as it casts a burden of discriminating inequality upon established bankers having valuable banking-houses and equipments; and finally, that it deprives such

bankers of their property without due process of law, and abridges their privileges and immunities in contravention of the fourteenth amendment to the constitution of the United States.

It was held in *City of Aurora v. West* (1857), 9 Ind. 74, that it is only the taking of specific pieces of private property by the exercise of the power of eminent domain, without compensation, that is prohibited by section 21, article 1 of the state constitution, and that property might be taken by taxation for public purposes, without any other compensation than the general and common benefits accruing from the expenditure of the fund thereby produced. It is equally clear that this constitutional provision was not intended to serve as a restraint upon the exercise of the police power of the state for the public welfare, by which a particular ²²⁴ use of property once lawful and unobjectionable may be forbidden, or property be wholly destroyed, without compensation and without the fault of the owner.

The insistence that the act grants special privileges and immunities is equally untenable. It is manifest that in every regulating statute the precise terms prescribed must be to some extent arbitrary, depending upon the exercise of a sound legislative judgment. The constitutional mandate is satisfied if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of others similarly circumstanced, and the provisions of the restrictive act be in fact open alike to all citizens who may bring themselves within its terms. This act neither confers special privileges nor makes unjust discriminations, but its privileges are open to every citizen upon the same terms. It denies no privilege to anyone, and operates alike upon all who may avail themselves of its benefits: *Parks v. State* (1902), 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *Barrett v. Millikan* (1901), 156 Ind. 510, 83 Am. St. Rep. 220, 60 N. E. 310; *Hancock v. Yaden* (1890), 121 Ind. 366, 16 Am. St. Rep. 396, 33 N. E. 253, 6 L. R. A. 576; *Barbier v. Connolly* (1885), 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; *State v. Currens* (1901), 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

The circumstance, that for a time it may inflict hardship, inconvenience and possibly loss to certain individuals, does not amount to a constitutional objection, so long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident of a general enactment fairly de-

signed to subserve the public welfare. If the mere fact of resulting inconvenience and loss to an established business, admittedly subject to public control, were sufficient to preclude control under the police power, then regulation would be practically impossible, and this most salutary and necessary power of sovereignty be seriously abridged or wholly destroyed. This statute ²²⁵ grants equal privileges and imposes like restrictions upon all persons under the same circumstances, and does not deprive appellee of due process of law, or deny him equal protection of the law in violation of the fourteenth amendment to the constitution of the United States: *Wurts v. Hoagland* (1885), 114 U. S. 606, 5 Sup. Ct. Rep. 1086, 29 L. ed. 229; *Duncan v. Missouri* (1894), 152 U. S. 377, 14 Sup. Ct. Rep. 570, 38 L. ed. 485; *Eldridge v. Trezevant* (1896), 160 U. S. 452, 469, 16 Sup. Ct. Rep. 345, 40 L. ed. 490; *Lowe v. Kansas* (1896), 163 U. S. 81, 16 Sup. Ct. Rep. 1031, 41 L. ed. 78; *Missouri Pac. R. Co. v. Mackey* (1888), 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. ed. 107; *Pacific Express Co. v. Seibert* (1892), 142 U. S. 339, 12 Sup. Ct. Rep. 250, 35 L. ed. 1035; *Budd v. New York* (1892), 143 U. S. 517, 12 Sup. Ct. Rep. 468, 36 L. ed. 247; *Hayes v. Missouri* (1887), 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30 L. ed. 578; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; *Mugler v. Kansas* (1887), 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *Powell v. Pennsylvania* (1888), 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1252, 32 L. ed. 253; *Crowley v. Christensen* (1890), 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620; *Bowditch v. Boston* (1879), 101 U. S. 18, 25 L. ed. 980; *Dent v. West Virginia* (1889), 129 U. S. 114, 9 Sup. Ct. Rep. 231, 32 L. ed. 623; *Missouri Pac. R. Co. v. Humes* (1885), 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. ed. 463; *Glucose Refining Co. v. City of Chicago* (1905), 138 Fed. 209.

In the case of *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, Justice Field, speaking for the court, said: "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like ²²⁶ circumstances in the enjoyment of

their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.”

In the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, Justice Harlan disposed of an objection similar to that advanced by appellee ²²⁷ in the following language: “It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose, as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose, the prohibition upon

their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments. This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. . . . The principle that no person shall be deprived of life, liberty or property without due process of law was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

The charters of national banks, state banks of discount and deposit, saving banks, and loan and deposit companies, ²²⁸ authorize them to hold permanently only such real estate as may be necessary for the immediate and convenient accommodation of their business. It is not required that this limitation be altogether wise and just to warrant a holding that it is valid, but it is sufficient if it appears that it was designed and is reasonably calculated to subserve some public purpose. Private banks may be fairly expected to accommodate the public by making loans and discounts, and to that end should have some capital in money, in addition to that intrusted to their care by depositors. It would be manifestly unwise to authorize an investment of the entire capital of a bank in real estate, furniture and fixtures, as inimical to public accommodation; and it is a matter of current history that depositors have been made the victims of imposition and fraud, through the allurements of pretended bankers whose only capital consisted of gilt signs, plate glass, mahogany

furniture and richly embellished safes. We are not judicially advised that the provision limiting the investment of banking capital in the species of tangible property named would unjustly or unreasonably invade individual rights, but, on the contrary, it appears to us that this provision was suitably designed for the public good, and is a prudent regulation for the guidance of solvent bankers, and a proper precaution against fraud and imposition on the part of financial charlatans. It is our conclusion, therefore, that section 2 of the act does not contravene any of the constitutional guaranties invoked by appellee.

The same constitutional objections are urged against the validity of that provision of section 3 of the act which requires the banker to make oath "that the responsibility and net worth of the individual members of such firm, partnership or individual is equal to an amount at least double the amount of capital paid into such bank." It is insisted that this clause prohibits a banker from using all of his capital in his business, and is an instance ²²⁹ of arbitrary selection and of illegal discrimination. It is not correct to say that the banker is thereby prohibited from using all his capital in his business, but he is forbidden from treating his entire holdings as capital stock, and in effect required to have and maintain a reserve or surplus fund. In considering this provision it must be borne in mind that the banking business is not wholly private, but quasi public in character, and subject to governmental supervision, and in view of this fact the arguments advanced appear more appropriate for legislative than for judicial consideration. This feature of the statute is not different in principle from the double liability of stockholders in incorporated banks, and for the reasons already given and upon the authorities cited we are of opinion that it does not violate any of the constitutional principles relied upon by appellee.

It is finally contended that the provision requiring that an individual, or one member of a firm, conducting a banking business under this act must be a resident of Indiana is invalid. We cannot sustain this objection.

In the case of *Welsh v. State* (1890), 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664, this court, among other things, said: "It is not true, as is sometimes argued, that the citizen derives his right to sell intoxicating liquor from the particular state in which he sells. In selling he is but exercising his

common-law right. . . . It is not an unreasonable requirement that a person who desires to avail himself of a license to retail intoxicating liquors shall submit himself to the jurisdiction of the state, by becoming an inhabitant thereof, to the end that he may be readily apprehended and punished for any violation of the law in connection with his business."

The propriety of this provision is readily manifest. A private banker inviting the confidence and patronage of the ²³⁰ public should not only possess suitable capital, but also a good character. The people intrusting their money to his care should be afforded an opportunity of learning something of his character, habits and mode of life without going beyond state lines for information. A good character will not insure the safety of a business intrusted wholly to employes, but personal supervision is highly requisite. The situs of the bank assets for the purpose of taxation should be definitely fixed, and not left open to dispute by the non-residence of the owner. It is important that the banker should be within the jurisdiction of our courts, civil and criminal, and be answerable personally to the complaints of creditors, and easily apprehended in case of a violation of the laws governing his business: *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; *Trageser v. Gray* (1890), 73 Md. 250, 25 Am. St. Rep. 587, 20 Atl. 905, 9 L. R. A. 780; *McCready v. Virginia* (1876), 94 U. S. 391, 24 L. ed. 248; *Wagner v. Town of Garrett* (1898), 118 Ind. 114, 20 N. E. 706. The provisions of the New York statute upon this subject are much more stringent, but their validity has not been questioned: See New York Banking Law, Laws 1882, c. 409, sec. 32.

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations, but the public interest existing, the means adopted for its protection must be reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The exercise of the police power is subject to the supervision of the courts, but police regulations may not be declared void merely because deemed contrary to natural justice and equity, but only because they violate some constitutional right. The provisions of the statute under consideration do not violate the constitutional guaranties re-

lied upon, but, in our opinion, have substantial relation to the public welfare, and were intended and are reasonably calculated to protect ²³¹ the people of the state against fraud and imposition, and are consequently valid.

The court erred in quashing the affidavit. The judgment is reversed, with directions to overrule appellee's motion to quash, and for further proceedings.

The Power of Legislatures to Regulate the Business of Banking, especially banking conducted by individuals and unincorporated concerns, is discussed in State v. Scougal, 3 S. Dak. 55, 44 Am. St. Rep. 756; Meadowcroft v. People, 163 Ill. 56, 54 Am. St. Rep. 447; Brady v. Matern, 125 Iowa, 158, 116 Am. St. Rep. 291.

TOWNS v. STATE.

[167 Ind. 315, 78 N. E. 1012.]

LARCENY.—One Who Solicits and Receives money at a public meeting in a church, with the intent to appropriate it to his own use, and falsely representing to the contributors that it is to be used for a certain benevolent purpose, is guilty of larceny. (p. 502.)

Foster C. Sherley, for the appellant.

Charles W. Miller, attorney general, C. C. Hadley, H. W. Dowling and W. C. Geake, for the state.

³¹⁶ HADLEY, J. Appellant obtained consent of the pastor of Grace Presbyterian church to occupy his pulpit, and ³¹⁷ make an appeal to the public for voluntary contributions for the building, at Jeffersonville, Indiana, of a mission home for ex-convicts, by falsely representing to the pastor that he was the general secretary and representative of a national organization of Christian workers, with headquarters at Battle Creek, Michigan, and that the object of said organization was to construct such homes in various parts of the country, and that his mission in Indianapolis was to raise funds for a home in Jeffersonville, which would cost fifteen hundred dollars, and that he had at the time in hand or pledged eleven hundred dollars of the amount. At a public meeting in the church appellant addressed the audience at length, repeating the representations he had made to the pastor, and, after an earnest plea as to the merits of his

mission, requested persons in his audience to make cash contributions, or sign pledge cards if not prepared with the money. There was no such organization at Battle Creek, Michigan, as appellant claimed to represent. He afterward told the detective who made the arrest that he had collected ninety-seven dollars, all of which, except eight dollars, he had kept for expenses, and the balance he had forwarded to the secretary and treasurer of the Christian Aid Society at Battle Creek, Michigan. The prosecuting witness, with others, believing the statements and representations and relying thereon, made a contribution of money.

Appellant was indicted and convicted of petit larceny, and assigns as error the refusal of the court to grant him a new trial. The real question is whether appellant's offense was larceny or obtaining money under false pretense.

Under the facts disclosed by the evidence and stated above there can be no doubt but that the defendant had formed the design to obtain money by deception, to appropriate what he got to his own use, and to deprive the contributors of it. These purposes existing in his mind at the time he solicited and received the ^{\$18} money constituted the felonious elements of larceny: *Fleming v. State* (1894), 136 Ind. 149, 36 N. E. 154.

That the money was given up with the owner's consent and without expectation of its return can make no difference, if the possession was obtained by a fraudulent trick or deception, and with the felonious intent not to return it, nor use it for the purpose represented by him and intended by the contributors, but to appropriate it to the taker's own use: *Stillwell v. State* (1900), 155 Ind. 552, 58 N. E. 709; *Crum v. State* (1897), 148 Ind. 401, 47 N. E. 833; *March v. State* (1889), 117 Ind. 547, 20 N. E. 444.

The reason of the rule is thus stated: "Where the defendant, with a preconcerted design to steal the property, obtains possession of it by fraud, the taking is larceny, for the reason that, as the fraud vitiated the transaction and left the title in the original owner, he still retains a constructive possession of the goods, and a conversion of them by the defendant is such a trespass to that possession as makes larceny": *Gillett on Criminal Law*, 2d ed., sec. 540. There was evidence justifying the jury in finding the defendant guilty of larceny.

While the state was delivering its evidence, a witness on direct examination, after testifying to certain statements made by the defendant, was asked by the prosecuting attorney the following question: "You may state what he said, if anything, as to what institution he was connected with in raising the money." All the evidence goes to show that appellant represented publicly and privately that he was the agent and general secretary of a benevolent association at Battle Creek, Michigan, and it was the theory of the state that this representation was false, and but a part of the defendant's scheme to deceive the people. In support of the theory the question was proper.

Judgment affirmed.

For Authorities in Support of the decision in the principal case, see the note to People v. Miller, 88 Am. St. Rep. 569.

BALTIMORE AND OHIO RAILROAD COMPANY v. SLAUGHTER.

[167 Ind. 330, 79 N. E. 186.]

NEGLIGENCE.—A Bare Licensee Who Goes upon the Premises of another for some purpose with which the owner or occupant has no concern, and without any enticement, allurement, or inducement being held out to him by the owner or occupant, assumes the perils arising from defects arising in the premises. (p. 506.)

RAILROAD CROSSING—Invitation to Use.—Where a railroad company constructs approaches to its track, and lays plank between the rails, apparently for a farm crossing, and one who owns land on both sides thereof, and also his tenants, make use of the crossing, the railroad company will be deemed to have invited such use. (p. 506.)

NEGLIGENCE—Invitation to Use Premises.—When the owner of land, by enticement, allurement, or inducement, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming. The enticement, allurement, or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's land by another is not sufficient, although the invitation may be inferred from some act or line of conduct, or from some designation or dedication. (p. 506.)

NEGLIGENCE—Invitation to Use Premises.—The word "invitation," as used in reference to a license to enter the premises of another, includes not only an actual bidding, but also an allurement or enticement. (p. 508.)

NEGLIGENCE—Invitation to Use Way.—When an owner constructs a way over his premises in such a manner as apparently to

be for the use of certain persons, with the intent that they shall use it, and they enjoy it for a considerable time, he owes to them the duty to exercise ordinary care for their safety while pursuing the privilege, so far as his own acts are concerned, and this is especially true as to a new and unapprehended danger. (p. 508.)

RAILROAD CROSSING—Handcar Frightening Team.—A complaint alleging that the defendant railroad company constructed a wagon road across its track, that the plaintiff has used the road since its construction, and that the defendant negligently placed a handcar near the crossing which frightened the plaintiff's team, and caused it to run away, to plaintiff's injury, states a cause of action. (pp. 508, 509.)

NEGLIGENCE—Necessity of Specific Allegations.—In complaints for negligence, it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion, not demurrer. (p. 510.)

NEGLIGENCE—Frightening Team—Pleading.—In an action for negligence in frightening a team by placing an object in or near a way, an averment in the complaint that the object was calculated to frighten horses of ordinary gentleness is unnecessary. (p. 511.)

RAILROAD CROSSING—Handcar Frightening Team.—A railroad company is liable for its negligence in placing a handcar, calculated to frighten ordinarily gentle horses, near a farm crossing. (pp. 512, 513.)

NEGLIGENCE—Pleading—Variance.—Where a complaint alleges that a railroad company left a handcar in a farm crossing way, but the evidence shows that the car was left near the way, the variance is at most technical, and the defect will be treated as obviated by amendment. (p. 514.)

Edward Barton and Charles L. Jewett, for the appellant.

L. A. Douglass and H. W. Phipps, for the appellee.

338 GILLET, J. According to appellee's complaint, appellant carelessly and negligently left within the traveled way of a farm crossing, and as an obstruction to the free use of the same, a handcar having upon it tools, tin dinner buckets, and clothing, and, as a result of the negligence charged, one of the animals—a mule—composing the team which appellee was driving along said way and across said track became frightened at the handcar and ran away, throwing appellee out of his wagon and injuring him. Appellant, having been defeated in the trial court, prosecutes this appeal, and by its first assignment of error draws in question the propriety of the ruling of the court below in overruling a demurrer to the complaint.

It is contended by appellant's counsel that, so far as the complaint shows, appellee was a bare licensee, and that, having availed himself of the privilege of using the crossing,

he was bound to accept it as he found it; or, in other words, that appellant could not properly be charged with negligence in having the car within the way.

The allegations of the complaint concerning appellee's authority to use the crossing are as follows: "That said part of said railroad which runs through said Clark county extends from the city of New Albany to the city of North Vernon, Indiana; that at a point on said line of road, at a point about five miles northeast of said city of New Albany, Indiana, and about three hundred yards northeast of what is called and known as the "K. and L." cement mills, defendant had, before November —, 1903, constructed a private wagon-road crossing of its said railroad track at said point, and which said crossing was then and there for the use and benefit of the owners of the adjoining lands on opposite sides of said railroad track at said point, and for their tenants, and for all others who might have occasion to cross over the same in the use of said lands aforesaid; ³³⁴ that said crossing was on said day properly constructed by fastening planks eight feet long to the ties in said track and filling in between them with broken stone, and defendant had also constructed approaches, about thirty feet in length, and not to exceed ten feet in width, by throwing up earth, in the form of embankments, and covering them with broken stone; that on said day plaintiff was a tenant of the person who owned the adjoining lands on either side of said track at said crossing, and had been for more than one year, and had on many occasions before said day, used said crossing in the prosecution of his said work as tenant; that he cultivated said adjoining lands as farming lands as such tenant, and on said day was entitled, as such tenant, to use said crossing with wagons and teams in the prosecution of his said work; . . . that about 5 o'clock in the afternoon of said day said plaintiff was lawfully driving a team consisting of one mule and one horse, attached to a two-horse wagon, from one portion of his said farm to another on the opposite side of said track of defendant, and in so doing had occasion to drive over and upon said crossing." In their statement of the contents of the complaint, appellant's counsel fully admit that it appears that appellee was a tenant of the adjacent farm, and that he went upon the crossing in the prosecution of his farm work.

It is doubtless the rule that a bare licensee who goes upon the premises of another for some purpose with which the owner or occupant has no concern, and without any enticement, allurement or inducement being held out to him by the owner or occupant, assumes the perils arising from defects existing in the premises. Within this class of cases are *Lingenfelter v. Baltimore etc. R. Co.* (1900), 154 Ind. 49, 55 N. E. 1021, and *Cannon v. Cleveland etc. R. Co.* (1902), 157 Ind. 682, 62 N. E. 8.

Putting aside all questions as to the effect of the act of April 8, 1885 (Acts 1885, p. 148; Burns' Rev. Stats. 1901, sec. 5320 et seq.), ³³⁵ we are nevertheless of opinion that the facts charged do not make out a case in which appellee's entry upon the railroad was simply not opposed and prevented. While it is true that it does not appear that the intent of the company in respect to the construction and maintenance of the crossing was ever communicated to anyone, or that appellee acted upon the assumption that the crossing was designed for his use, yet, taking the subjective intent in respect to the purpose of its construction and maintenance, coupled with the fact that the planking of the space between the rails and the building of the long approaches on either side tended to show objectively what the intent was, and adding to this the frequent prior user of the way by appellee, and we have a case wherein it appears to us that it would be contrary to good morals to permit appellant in effect to shift its ground, after the injury and after it had been haled into court, by asserting that appellee had ventured upon the crossing without invitation and at his own risk. Not to refine too much, it seems to us not unreasonable that the company should be subjected in the circumstances to the consequences of having extended an invitation which had been acted on.

In *Indiana etc. R. Co. v. Barnhart* (1888), 115 Ind. 399, 16 N. E. 121, this court said: "When a person has a license to go upon the grounds or the inclosure of another, he takes the premises as he finds them, and accepts whatever perils he incurs in the use of such license. But when the owner or occupant, by enticement, allurement or inducement, whether express or implied, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming, and for any breach of duty in that respect such owner or occupant becomes liable

for any injury which may result to the person so caused to come onto his lands. The enticement, allurement or inducement, as ³³⁶ the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's land by another is not sufficient. Such an implied invitation may be inferred from some act or line of conduct, or from some designation or dedication. This general doctrine was affirmed in the case of *Evansville etc. R. Co. v. Griffin* (1885), 100 Ind. 221, 50 Am. Rep. 783, and is well supported by a long line of authorities: *Sweeney v. Old Colony etc. R. R.* (1866), 10 Allen, 368, 87 Am. Dec. 644; *Smith v. London etc. Docks Co.* (1868), L. R. 3 C. P. 326; *Carleton v. Franconia Iron etc. Co.* (1868), 99 Mass. 216; *Toledo etc. R. Co. v. Grush* (1873), 67 Ill. 262, 16 Am. Rep. 618; *Doss v. Missouri etc. R. Co.* (1875), 59 Mo. 27, 21 Am. Rep. 371; *Elliott v. Pray* (1866), 10 Allen, 378, 87 Am. Dec. 653; *Stratton v. Staples* (1871), 59 Me. 94; *New Orleans etc. R. R. Co. v. Hanning* (1872), 15 Wall. 649, 21 L. ed. 220; *Bennett v. Louisville etc. R. Co.* (1881), 102 U. S. 577, 26 L. ed. 235; *Hayes v. Michigan Cent. R. Co.* (1884), 18 Rep. 193. See *Lary v. Cleveland etc. R. Co.* (1881), 78 Ind. 323, 41 Am. Rep. 572; *Pittsburgh etc. R. Co. v. Bingham* (1876), 29 Ohio St. 364; *Jeffersonville etc. R. Co. v. Goldsmith* (1874), 47 Ind. 43; *Hargreaves v. Deacon* (1872), 25 Mich. 1; *Nicholson v. Erie R. Co.* (1870), 41 N. Y. 525; *Durham v. Musselman* (1827), 2 Blackf. 96, 18 Am. Dec. 133; *Hounsell v. Smyth* (1860), 97 Eng. C. L. 731; *Gillis v. Pennsylvania R. Co.* (1868), 59 Pa. 129, 98 Am. Dec. 317; *Southcote v. Stanley* (1856), 1 Hurl. & N. 247; *Bolch v. Smith* (1862), 7 Hurl. & N. 736; *Lygo v. Newbold* (1854), 24 Eng. L. & Eq. 507; *Burdick v. Cheadle* (1875), 26 Ohio St. 393, 20 Am. Rep. 767; *Hardcastle v. South Yorkshire R. etc. Co.* (1859), 4 Hurl. & N. 67."

The case as pleaded contains some of the elements of a dedication, and while we would not be understood as applying ³³⁷ that doctrine to a private use, yet the consideration is not without value in determining whether it is just to hold that appellee occupied no higher plane of right, as respects negligence, than a mere trespasser. In *Bennett v. Louisville etc. R. Co.*, 102 U. S. 577, 26 L. ed. 235, we find the court observing: "The deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had, so to speak, been dedi-

cated by the owner." An essentially similar observation is to be found in *Indiana etc. R. Co. v. Barnhart* (1888), 115 Ind. 399, 16 N. E. 121. But the word "invitation," to which the cases on the subject under consideration so often refer, includes, both in its lexicographical and its legal sense, not only an actual bidding, but also an allurement or enticement. While an invitation may not, at least in most circumstances, grow out of mere passivity as respects the condition of the premises, yet the cases abundantly justify the assertion that where an owner constructs a way over his premises in such a manner as apparently to be for the use of certain persons, with the intent that they should use it, and they continue to enjoy it for a considerable period of time, he owes to them a duty to exercise ordinary care for their safety while pursuing the privilege, so far as his own acts are concerned, and this is especially true as to a new and unapprehended danger.

In *Corby v. Hill* (1858), 4 Com. B., N. S., 556, the plaintiff was injured while driving along a private road, extending from a turnpike to a lunatic asylum, owing to the presence of a quantity of slate which the defendant had deposited upon the way. The latter attempted to justify under the permission of the owners of the soil. Cockburn, C. J., said: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. . . . Having, so to speak, ³³⁸ dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission." In the same case, Williams, J., said: "I see no reason why the plaintiff should not have a remedy against such wrongdoer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it." Willes, J., remarked: "The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or

permit another to dig a pit thereon, so that persons lawfully coming there may receive injury." It is our conclusion that the facts pleaded show that appellee was more than a bare licensee, and that he was entitled to complain of the negligence charged.

Thus far we have dealt with a question, owing to the generality of the points made, which it was perhaps not the intention of counsel for appellant to raise. While they assert that appellee was a bare licensee, to whom appellant was not liable for its negligence, yet their whole ground for this assertion, so far as anything definitive in their brief is concerned, is based on the statement in *Bennett v. Louisville etc. R. Co.*, 102 U. S. 577, 26 L. ed. 235, to the effect that it is stated in *Campbell on Negligence*, section 33, that "the principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." But even in the ³³⁹ case of *Bennett v. Louisville etc. R. Co.*, 102 U. S. 577, 26 L. ed. 235, the court states that no definite rule can be laid down, and the whole trend of the opinion is against the position of counsel. In the absence of further proof of the circumstances of the party's entry than that it was for his pleasure or benefit, there may be a presumption that he was a bare licensee, but the view is utterly wrong that this fact forms the basis of a controlling principle. In the leading case of *Sweeny v. Old Colony etc. R. R.* (1866), 10 Allen, 368, 87 Am. Dec. 644, the company was held liable for the negligence of its flagman in signaling that the way was clear at a crossing which belonged to the railroad but which it had permitted the public to use for the purposes of travel. It was argued on behalf of the company that to hold it liable would involve the anomaly of charging it with a failure to guard a place which it was not bound to keep open, but Bigelow, C. J., said: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence." And so we find it stated by Judge Cooley, that if one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it

is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit": Cooley on Torts, 2d ed., 605.

The next objection which appellant's counsel urge against the complaint is that it fails to aver that the handcar and articles thereon were calculated to frighten horses of ordinary gentleness. There is no doubt that this is an essential element in the case, but it does not follow that it must be specifically alleged. ³⁴⁰ It is charged that the defendant carelessly and negligently placed said handcar lengthwise upon the crossing, and carelessly and negligently obstructed the free use of the same by said handcar and also that the accident and injuries set forth were caused by, and were the direct result of, the negligence charged. We are of opinion that it was not necessary to plead more specifically as to the nature of the defect. It is a general rule, both in this state and elsewhere, that in complaints or declarations for negligence it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion; it cannot be taken advantage of by demurrer: *Brookville etc. Turnpike Co. v. Pumphrey* (1877), 59 Ind. 78, 26 Am. Rep. 76; *Ohio etc. R. Co. v. Collarn* (1881), 73 Ind. 261, 38 Am. Rep. 134; *Louisville etc. R. Co. v. Krimming* (1882), 87 Ind. 351; *Cleveland etc. R. Co. v. Wynant* (1885), 100 Ind. 160; *Cincinnati etc. R. Co. v. Gaines* (1886), 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746; *Town of Rushville v. Adams* (1886), 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292; *Pittsburgh etc. R. Co. v. Kitley* (1889), 118 Ind. 152, 20 N. E. 727; *Cleveland etc. R. Co. v. Wynant* (1889), 119 Ind. 539, 20 N. E. 730; *Rodgers v. Baltimore etc. R. Co.* (1898), 150 Ind. 397, 49 N. E. 453, and cases cited; *Lake Erie etc. R. Co. v. McFall* (1905), 165 Ind. 574, 76 N. E. 400; note to *King v. Oregon etc. R. Co.* (1898), 59 L. R. A. 209.

It is not necessary, in order to justify the submission of the question of negligence to a trial, that it should appear that the effect of the act or omission complained of as negligent would in all cases, or even ordinarily, be to produce the consequences which followed. It is sufficient to present a trial question if it was to be reasonably apprehended that

such an injury might thereby occur to another while exercising his legal ³⁴¹ right in an ordinarily careful manner: *Ohio etc. R. Co. v. Trowbridge* (1890), 126 Ind. 391, 26 N. E. 64. It is not an uncommon thing, as the courts judicially know, for horses to be frightened at unusual objects: *Billman v. Indianapolis etc. R. Co.* (1881), 76 Ind. 166, 40 Am. Rep. 230; *Wharton on Negligence*, 2d ed., sec. 107. Whether the act of placing the handcar within the limits of the crossing was so calculated to frighten horses which might pass along the way as to render it negligent to do such an act was a mixed question of law and fact, and it was presented by the issue formed upon the allegation that the act was negligently done. In *Cleveland etc. R. Co. v. Wynant* (1887), 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118, Mitchell, C. J., said: "All horses are disposed to scare or shy at objects of an unusual character in a highway. Roads are prepared with reference to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit. These are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject to be pleaded and proved, whether a box-car, or any other particular object, is naturally calculated to frighten horses. This is to be determined by the experience, observation and intelligence of the court and jury as applied to all the facts of the particular case before them." But without further discussion of the objection stated, we content ourselves with the statement that in several cases this court has treated as unnecessary the averment that the object complained of was calculated to frighten horses of ordinary gentleness: *Brookville etc. Turnpike Co. v. Pumphrey* (1877), 59 Ind. 78, 26 Am. Rep. 76; *Cincinnati etc. R. Co. v. Gaines* (1886), 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746; *Town of Rushville v. Adams* (1886), 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292; *Pittsburgh etc. R. Co. v. Kitley* (1889), 118 Ind. 152, 20 N. E. 727; *Rodgers v. Baltimore etc. R. Co.* (1898), 150 Ind. 397, 49 N. E. 453.

The further objection is made to the complaint that it fails to aver that appellee's mule was an animal of ordinary ³⁴² gentleness. The allegation which the complaint contains is that the mule was "well broken and not fractious or balky." If this be not an equivalent allegation, we are nevertheless of opinion that the general charges in respect to

negligence rendered the complaint good on demurrer. Conceding, as we do, that there is no liability where the object which occasioned the mischief was not naturally calculated to frighten horses of ordinary gentleness, yet it by no means follows that the owner of a high-spirited horse is remediless for an injury occasioned by its running away, owing to its being frightened by an object naturally calculated to frighten horses of ordinary docility. In view of the statute (Burns' Rev. Stats. 1901, sec. 359a; Acts 1899, p. 58), we cannot assume that appellee was guilty of contributory negligence in driving the animal in question, and with this element subtracted from the case as presented by the complaint, appellee appears to be entitled to recover on the facts admitted by the demurrer, as it is averred in the complaint that appellant was negligent in the particulars stated, and that such negligence was the cause of, and directly resulted in, the accident and injury. If, without the contributory fault of the driver, a horse runs away, and the negligent act of another is so far an efficient cause that, but for such negligence, the horse would not have run away, it would seem on general principles that the latter would be liable for an injury thereby caused to the driver: *Grimes v. Louisville etc. R. Co.* (1892), 3 Ind. App. 573, 30 N. E. 200, and cases cited. This state of facts seems, in legal effect, to be shown by the complaint before us when it is subjected to the rules of construction which govern complaints in negligence cases. It was assumed in *Town of Rushville v. Adams* (1886), 107 Ind. 475, 57 Am. Rep. 124, 8 N. E. 292, not only that it is required that the object or obstruction should be one calculated to frighten horses of ordinary gentleness, but also that the particular horse should be of that character. ⁸⁴³ In answer, however, to the objection that these facts did not appear from the complaint, the court in that case said: "The general averment in the complaint before us that the injury was not caused by any negligence or carelessness on the part of the plaintiff, but was caused wholly by the negligence of the town in permitting the person to maintain and carry on the business of making candy on the street, we think, makes the complaint good as against the demurrer for want of facts." Bearing in mind the effect of the contributory negligence statute since passed, the case from which we have just quoted appears to be an apposite precedent in support of the view—whether the character of the particular animal be an element or not—

that the general charge of negligence, coupled with the averment that the injury was thereby caused, sufficiently shows that the legal rights of the complaining party have been invaded: See, also, *Keeley Brewing Co. v. Parnin* (1895), 13 Ind. App. 588, 41 N. E. 571. We hold that the complaint is sufficient.

Under an assignment of error based on the overruling of a motion for a new trial, appellant's counsel argue that in a number of particulars the evidence fails to sustain the verdict. We have read the testimony, as set out in the bill of exceptions, and are of opinion that it cannot be said that there is an entire lack of evidence in support of any proposition which appellee was called on to maintain under the issues. The point which counsel for appellant place most stress upon under the assignment in question is that the testimony shows that the handcar was at one side of and not in the way, and it is claimed that for this reason the evidence failed to sustain the theory of the complaint. There seems to be some confusion in the testimony between the way, as it was graded up, and the ordinary or traveled track. There is some testimony that the handcar was within the way. But if it can be said that the evidence shows that the handcar was outside of, ³⁴⁴ although very near, the way, yet it does not follow that appellee was not entitled to recover. Where an object calculated to frighten horses is placed near, but not in, a public street, there would be a question as to the liability of the city therefor, owing to the fact that the municipality did not have control over the place where the object was located. We can perceive no reason, however, for the holding that where the title to a way and the adjoining lands is in the same person there is no liability. Even in the case of a conveyance of a way of a fixed width, it would be to permit the holder of the servient estate to derogate from his own grant to uphold him in his act of placing an object calculated to frighten horses so near the way as to impair the value of the use. The placing of the handcar where it was, if the act was really calculated to produce the mischief complained of, impinged upon the rights of appellee, although perhaps in a lesser degree than would have been the case had there been a physical obstruction of the way. Even in the case of a public road, a municipality may be liable for placing an obstruction calculated to frighten horses within the margin thereof: *Foshay v. Town of Glen Haven* (1870), 25 Wis. 288,

3 Am. Rep. 73; *Morse v. Town of Richmond* (1868), 41 Vt. 435, 98 Am. Dec. 600. As indicated in the latter case, the right to control the whole width of the road gives rise to a corresponding duty. There are perils attending the use of farm crossings which are concomitants of the use, such as the dangers occasioned by the passing of trains and the like, but the act in question caused a wholly unnecessary peril, and one which was in no wise inherent in the use, and it was the invasion of appellee's right in this particular which really constituted the gist of his action. If it can be said that evidence that the handcar was placed on the margin of the way does not substantially prove the allegation as laid, yet at most there was but a technical variance, which it is our duty to treat as ³⁴⁵ if the defect had been obviated by amendment: *Farley v. Eller* (1868), 29 Ind. 322; *Reddick v. Keesling* (1891), 129 Ind. 128, 28 N. E. 316; *Latshaw v. State* (1901), 156 Ind. 194, 59 N. E. 471; *Hartwell Bros. v. Peck* (1904), 163 Ind. 357, 71 N. E. 958; *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489, 73 N. E. 996. This was the holding in *Bristol Hydraulic Co. v. Boyer* (1879), 67 Ind. 236, where the supposed variance was of the same character as it is contended existed in this case.

We find no error. Judgment affirmed.

If One Invites Another to Go upon His Premises, either expressly or by implication, there arises an obligation to use ordinary care that the visitor shall not be injured: *Klugherz v. Chicago etc. Ry. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384; *Shobert v. May*, 40 Or. 68, 91 Am. St. Rep. 453; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708; *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298; *Atlanta Cotton-seed Oil Mills v. Coffey*, 80 Ga. 145, 12 Am. St. Rep. 244; *Donaldson v. Wilson*, 60 Mich. 86, 1 Am. St. Rep. 487. For the application of this rule to railroad companies that invite persons to go upon or across their tracks, see *Williamson v. Southern Ry. Co.*, 104 Va. 146, 113 Am. St. Rep. 1032; *Wabash R. R. Co. v. Erb*, 36 Ind. App. 650, 114 Am. St. Rep. 392; *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419; *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218; *Virginia etc. Ry. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298, 6 Am. St. Rep. 521.

DIGAN v. MANDEL.

[167 Ind. 586, 79 N. E. 899.]

BILLS AND NOTES—Allegation of Ownership.—If the plaintiff in an action on a note is not the payee therein named, he must allege facts showing his title or right to maintain the action. This requirement is met by an averment that, by mistake and inadvertence in drafting, the note was made payable to a bank instead of the plaintiff. (p. 517.)

BILLS AND NOTES—Pleading—Variance.—In an action on a note the specific title alleged must be proved as laid. (p. 518.)

BILLS AND NOTES—Proof of Signature—Delivery.—When the execution of a note is denied, a delivery of the writing must be proved, as well as the signatures of the parties disputing its validity. (p. 518.)

BILLS AND NOTES.—A Plea of Non Est Factum is not necessary, in an action on a note against the administrator of one of the parties, to impose upon the plaintiff the burden of proving the execution and assignment of the note. (p. 520.)

BILLS AND NOTES—Mistake in Name of Payee.—A plaintiff suing on a note purporting to be payable to another person, may show that he was the payee intended. (p. 520.)

BILLS AND NOTES—Presumption of Delivery from Possession.—Where the complaint in an action on a note alleges that, by mistake and inadvertence, the note was made payable to a bank, that the bank indorsed it to the payee intended, and that he indorsed it to the plaintiff, evidence that the maker's signature is genuine, that the intended payee had the note in his possession two or three years after its date, and that bank at all times disclaimed any title to the note, does not raise an inference of its delivery, when its execution is denied. (pp. 522, 523.)

McConnell, Jenkines, Jenkines & Stuart, for the appellant.

Lairy & Mahoney, for the appellee.

588 MONTGOMERY, C. J. Appellee brought this action upon a promissory note against Max Jennings and James O'Donnell. No service was obtained upon Jennings, and no appearance by him entered. O'Donnell answered (1) general denial, (2) non est factum, (3) payment, (4) want of consideration, and (5) that the note was signed by O'Donnell as surety, and at the time was intentionally made payable at the City National Bank of Logansport, with the understanding between him and Jennings that appellee's assignor, John F. Troutman, should also sign the note as cosurety; that the note was never delivered to the payee therein named, nor any consideration given for its execution; that the note

came into the hands of Troutman long after the time fixed for its maturity, and without the knowledge or consent of O'Donnell, and by means unknown to him. The affirmative answers were denied. O'Donnell died, and appellant, as his administrator, was substituted as defendant, and thereupon filed answers (1) denial, (2) ⁵⁸⁹ non est factum, and (3) want of consideration. Appellee replied to the third paragraph of answer in denial. A trial by the court resulted in a finding and judgment in favor of appellee for the full amount of principal and interest evidenced by the note, together with attorneys' fees and costs.

The controlling question for our consideration is presented by the assignment that the court erred in overruling appellant's motion for a new trial. The complaint alleges in substance the following facts:

On September 17, 1899, Max Jennings was indebted to John F. Troutman in the sum of two hundred and fifty-one dollars and thirty-four cents, and to evidence and secure the same Jennings as principal and O'Donnell as surety executed to Troutman the following promissory note:

“Logansport, Indiana, September 17, 1899.

“Ninety days after date, we, or either of us, promise to pay to the order of the City National Bank of Logansport, at the City National Bank of Logansport, Indiana, \$251.34, with interest at the rate of eight per cent per annum from date, and attorneys' fees. The makers and indorsers jointly and severally waive presentment for payment, protest, notice of protest, and nonpayment of this note.

“MAX JENNINGS.

“JAMES O'DONNELL.”

By mistake and inadvertence in drafting, said note was made payable to the City National Bank of Logansport, Indiana, and upon discovery of such mistake, about March 17, 1901, the bank assigned the note to Troutman by the following indorsement thereon: “Pay to the order of John F. Troutman, without any recourse on us. City National Bank.” Troutman indorsed the note to appellee, and the same is due and unpaid. The signature of O'Donnell to the note was shown to be genuine, and the execution of the indorsements by the City National Bank and John F. Troutman was proved. The note was read in evidence. John Gray testified that he was president of the City National ⁵⁹⁰ Bank, and prior to the bringing of this action, and per-

haps three years after the date of the note, he made the indorsement in the name of the bank. The note was then in the possession of Troutman, and before he examined it or made the indorsement his attention was called to the fact that it was by its terms made payable to the bank. After making the indorsement he handed the note back to Troutman and could not recall that he had seen the note at any other time, either before or since. The bank never paid any consideration to anyone for the note, and it was never delivered to or the property of the bank, and was only in the hands of the witness for the purpose of writing the indorsement made at the request of Troutman. The amount recoverable as attorneys' fees was agreed upon, and this was substantially all the evidence given in the case.

Appellant insists that all the material and necessary allegations of the complaint are not proved, and that the decision of the court is not sustained by the evidence.

The note upon its face is not payable to the appellee, but is payable to the order of a third party, and, in an action upon such an instrument, it is incumbent upon the plaintiff to allege facts in the complaint showing his title or right to maintain the action: *Carskaddon v. Pine* (1900), 154 Ind. 410, 56 N. E. 844; *Keller v. Williams* (1875), 49 Ind. 504; *Nelson v. Johnson* (1862), 18 Ind. 329; *Stowe v. Weir* (1860), 15 Ind. 341; *Barcus v. Evans* (1860), 14 Ind. 381; *Montague v. Reineger* (1861), 11 Iowa, 503.

This requirement is met with the averment that, by mistake and inadvertence in drafting, the note was made payable to the bank, instead of Troutman the payee intended, and by Troutman was indorsed to appellee. Under these averments the City National Bank never acquired any interest in the note, and was not an assignor within the meaning of that term as used in section 277 of Burns' Revised Statutes of 1901, section 276 of the Revised Statutes of 1881, and, even in the absence of the indorsement by it shown in ⁵⁹¹ the complaint, would not have been a necessary party to the action: *Smith v. Walker* (1893), 7 Ind. App. 614, 34 N. E. 843; *Rhyan v. Dunnigan* (1881), 76 Ind. 178; *Meeker v. Shanks* (1887), 112 Ind. 207, 13 N. E. 712. The indorsement by the bank passed no right or title in or to the paper not already vested in the holder. The manifest theory of the complaint is that Troutman, through whom appellee derived title, was the real payee intended at the time the note was executed; that he

did not acquire his title by indorsement or delivery, but that the note was executed to him directly, and that another name, not a mere trade name of his, but the name of a third party, was written therein as payee by mistake and inadvertence. It is a general rule of pleading that a plaintiff must succeed, if at all, upon the case made by his complaint, and his evidence must prove his case upon the theory pleaded in the complaint or he will fail: *Terre Haute etc. R. Co. v. McCorkle* (1895), 140 Ind. 613, 40 N. E. 62; *Holderman v. Miller* (1885), 102 Ind. 356, 1 N. E. 719; *Leeds v. City of Richmond* (1885), 102 Ind. 372, 1 N. E. 711.

The rule more particularly stated and applied is to the effect that, when an action is brought upon a note or other chose in action, the specific title alleged must be proved as laid, the same as if the action were brought for the recovery of real estate: *Indianapolis etc. R. Co. v. Center Tp.* (1895), 143 Ind. 63, 40 N. E. 134; *Smelser v. Wayne etc. Turnpike Co.* (1882), 82 Ind. 417; *Morgan v. Smith etc. Organ Co.* (1880), 73 Ind. 179; *Wallace v. Reed* (1880), 70 Ind. 263; *Jackson Tp. v. Barnes* (1876), 55 Ind. 136; *Smith v. Walker* (1893), 7 Ind. App. 614, 34 N. E. 843.

The contested question for decision is whether there is any evidence to sustain the allegation that the instrument in suit was executed by the makers to John F. Troutman, and, by mistake and inadvertence in drafting, his name was omitted and another inserted as payee. Appellee's counsel contend that proof of the genuineness of O'Donnell's signature,⁵⁹² together with possession of the paper by Troutman two or three years after its date, and a denial by the City National Bank, the nominal payee, that the note was never executed to it, warrants and sustains the finding in his favor.

The delivery of an instrument is a material element in its execution, and when execution is denied a delivery of the writing must be proved, as well as the signatures of the parties disputing its validity. In the case of *Purviance v. Jones* (1889), 120 Ind. 162, 16 Am. St. Rep. 319, 21 N. E. 1099, Judge Mitchell, speaking of the delivery of a note, very aptly said: "To constitute a delivery it must appear that the maker, in some way, evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use." Appellee relies upon the following cases to justify

the inference of delivery from the facts proved: *Brooks v. Allen* (1878), 62 Ind. 401; *Taylor v. Gay* (1842), 6 Blackf. 150; *Stayner v. Joyce* (1889), 120 Ind. 99, 22 N. E. 89; *Green v. Beckner* (1891), 3 Ind. App. 39, 29 N. E. 172; *Garrigus v. Home etc. Soc.* (1891), 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009; *Talbott v. Hedge* (1892), 5 Ind. App. 555, 32 N. E. 788; *Meeker v. Shanks* (1887), 112 Ind. 207, 13 N. E. 712.

The case of *Taylor v. Gay* (1842), 6 Blackf. 150, so far as it declares that contracts such as a promissory note are established by their production by the plaintiff and proof of the signature of the defendant or of his handwriting, and that the ceremony of delivery does not attach to this kind of contract, is not in exact accord with the later holdings of this court. In the case of *Purviance v. Jones* (1889), 120 Ind. 162, 16 Am. St. Rep. 319, 21 N. E. 1099, speaking to this point, Judge Mitchell said: "The acts which consummate the delivery of a promissory note are not essentially different from those required to complete the execution of a deed. Act and intention are the two elements essential to the delivery of a deed, which is ordinarily ⁵⁹³ effected by the simple manual transfer of possession from the grantor to the grantee with the intention of passing the title and relinquishing all power and control over the instrument itself. The final test is, Did the maker do such acts in reference to the deed, or other instrument, as evidence an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee": See, also, *Palmer v. Poor* (1889), 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469, and cases cited.

The cases of *Stayner v. Joyce* (1889), 120 Ind. 99, 22 N. E. 89, *Talbott v. Hedge* (1892), 5 Ind. App. 555, 32 N. E. 788, and *Green v. Beckner* (1891), 3 Ind. App. 39, 29 N. E. 172, merely hold that possession by the plaintiff and proof of defendant's signature authorize the introduction of the note in evidence. This holding is unquestionably correct, as was said also in the case of *Kusler v. Crofoot* (1881), 78 Ind. 597. The order of proof is not material, and the introduction of the note may be followed by proof of its delivery. The case of *Meeker v. Shanks* (1887), 112 Ind. 207, 13 N. E. 712, while somewhat similar in facts, is but remotely in point as an authority upon the question in controversy in this case. The plaintiff in that case declared upon a title derived through an

indorser, and no question of the sufficiency of the evidence was involved.

In the case of *Brooks v. Allen* (1878), 62 Ind. 401, the real dispute was not as to the genuineness of the signature or the delivery of the note, but concerning an alleged alteration made after the signing and delivery of the paper, and the court correctly held that the burden of showing such alteration under the issues was upon the defendant, and, in the absence of any indication of the alleged alteration on the face of the note, or other evidence of the fact, the plaintiff would be entitled to recover. In that case, and also in the case of *Garrigus v. Home etc. Soc.* (1891), 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009, the declaration of law, that possession of a note will raise a presumption of delivery, was made with reference ⁵⁹⁴ to notes in the possession of the payee therein named. We are not required to pass upon that question in this case.

The plea of non est factum was filed by appellant, but, under the provisions of section 2479 of Burns' Revised Statutes of 1901, Acts of 1883, page 151, section 11, no such answer was necessary to impose upon appellee the burden of proving the execution of the instrument sued upon, and of the assignments of the same: *Riser v. Snoddy* (1856), 7 Ind. 442, 65 Am. Dec. 740; *Mahon's Admr. v. Sawyer* (1862), 18 Ind. 73; *Barnett's Admr. v. Cabinet Makers' Union* (1867), 28 Ind. 254; *Cawoods' Admr. v. Lee* (1869), 32 Ind. 44; *Estate of Wells v. Wells* (1880), 71 Ind. 509.

We have already shown that the averments in the complaint that appellee's assignor, Troutman, was the payee intended, and that a mistake occurred in drafting the note by which another name was inserted as such payee, were material and necessary to show appellee's true title. Construing the complaint as we do, this case comes within the rule announced in *Leaphardt v. Sloan* (1840), 5 Blackf. 278, declared in the following words: "If a promise be made to a person by a wrong name, the promisee may sue upon that promise in his right name, and aver himself to be the person intended. And a plaintiff suing upon a promissory note, which purports to be payable to a person of a different name, may show by evidence that he was the person intended." In the case of *McKinney v. Harter* (1845), 7 Blackf. 385, 43 Am. Dec. 96, Judge Blackford, in discussing a similar question, said: "The allegation amounts to an averment that the defendant made

the duebill to the plaintiff by the name mentioned in it. The instrument offered in evidence agreed with the description in the declaration, and was admissible. The plaintiff, however, could not recover without other evidence besides the duebill. It was necessary for him to prove that, by the words in the duebill, 'the estate of Thomas Eager, deceased,' the plaintiff was the party intended. But he had ⁵⁹⁵ a right to introduce the duebill previously to offering any other evidence": See, also, *Rhyan v. Dunnigan* (1881), 76 Ind. 178.

Appellee relies wholly upon the inference to be drawn from possession of the paper by Troutman to establish the requisite delivery. As pertinent to this feature of the case we quote from the well-considered case of *Sears v. Daly* (1903), 43 Or. 346, 73 Pac. 5: "In an action upon a promissory note, where its execution is denied by the defendant, there is no presumption that it has been regularly executed. In such case the plaintiff must establish the fact that it is the note of the defendant, and on this proposition he has the burden of proof throughout. . . . In case an instrument in form a promissory note is shown or admitted to have been executed, certain presumptions will attach to it in the hands of the holder, such as that it was made for a valuable consideration, regularly indorsed for value before maturity, is truly dated and the like; . . . and, in an action thereon between the immediate parties, the onus is upon the defendant to establish any affirmative defense. . . . But where the making of the note is the point in issue, no presumption can attach until its execution is shown. A promissory note is a promise in writing to pay to a person therein named a certain sum of money at a specified time. Until the fact of the signing and delivery by the defendant, or by his authority, is established, there is no promissory note, and nothing to which a presumption can attach." We quote with approval from the opinion in the case of *Chenot v. Lefevre* (1846), 8 Ill. 637, as peculiarly applicable to this case, the following language: "The defendant requested the court to give two instructions . . . as follows: If the jury believe from the evidence that the notes offered in evidence are payable to a person of a different name from that of the plaintiff, and that there was no testimony before them showing that the plaintiff was the person ⁵⁹⁶ intended, they must find for the defendant. This instruction the court refused to give. In this the court erred. Where a note is given to a person by a name other than his

real name, he may aver in the declaration that the note was given to him by the name as specified in the note; but then it is necessary to prove to the satisfaction of the jury that he was the person intended as payee. That is an allegation that requires to be established by the proof as much as any other material allegation in the declaration, and is not established by the mere fact that the plaintiff has possession of the note. It is probable that where the initial of the given name is only given in the note, that the bare possession of the note would be sufficient to entitle him to recover, where there was no suspicion otherwise in the case; but where the name is another than that of the plaintiff, extraneous evidence of the identity must be produced." In the case of *Stowe v. Weir* (1860), 15 Ind. 341, this court said: "A party cannot be permitted to rely upon a mere possession to establish title to a promissory note, while his pleadings aver a transfer in writing." In the case of *Smith v. Walker* (1893), 7 Ind. App. 614, 34 N. E. 843, the complaint averred that the note in suit was executed to the appellee Walker, but by mistake and inadvertence the name of C. C. Smith was written therein as payee, and the court said: "It was incumbent on appellee to prove on the trial the facts alleged in the complaint. If he had failed to establish the alleged mistake, as charged (or, perhaps, if it had appeared that Smith ever, at any time, had any interest in the note), there would have been a fatal variance between the pleading and the proof."

We have referred to and quoted from various decisions of this court relating to the subject under consideration, for the purpose of exhibiting the process by which our conclusion was reached. The possession of the paper by Troutman shown, payable as it was to the City National Bank, conceding the signature of appellant's decedent to be genuine, ⁵⁹⁷ affords no basis for the inference that the note was fully executed by delivery. Appellee relies upon the general principle that possession is prima facie evidence of title to establish the delivery. The general doctrine as applied to contentions over the title to existing articles of property is well established. If the dispute here concerned only the title to the paper irrespective of the writing upon it, the possession of Troutman and his assignee might give color of title and create a presumption of ownership. Delivery involves both an act and an intention, and where the contest is waged with respect to the act and purpose necessary to create the article,

and give it existence and legal force, there can be no presumption of law or foundation for an inference of fact in favor of one not in terms a party to the disputed instrument. It was incumbent on appellee to prove delivery, or to prove such facts as warranted the inference of delivery by the trial court. In this respect there is a failure of evidence.

Appellee was required, under the issues, to prove also that the name of the City National Bank was inserted in the paper by mistake, and that Troutman was the payee intended by the makers. The indorsement by the bank and the testimony of its president as given had no tendency to prove such fact. It was clearly shown that the bank knew nothing as to the intention of the parties at the time of signing the paper, and at no time had any interest in the alleged note, and so could not, and did not, attempt to confer any right with regard to it upon Troutman. The only relevant presumption of law attaching to a writing fully executed is that it contains and correctly expresses the intention of the parties to the same. This presumption may be rebutted by an allegation and proof of a mistake. If, then, any inference upon the subject of intent could be drawn from this writing, in the absence of extrinsic evidence, it would be that the signers intentionally inserted the name of the City National Bank ⁵⁹⁸ as payee, and that there was no mistake in drafting the instrument. In our opinion the evidence fails, in the respects indicated, to support the decision of the trial court, and a new trial must be awarded.

The judgment is reversed, with directions to sustain appellant's motion for a new trial, and for further proceedings.

The Delivery of a Promissory Note, actual or constructive, is usually as essential to its validity as the signature of the maker: *Purviance v. Jones*, 120 Ind. 162, 16 Am. St. Rep. 319; *McCormick etc. Machine Co. v. Faulkner*, 7 S. Dak. 363, 58 Am. St. Rep. 839; note to *Cochran v. Fox Chase Bank*, 103 Am. St. Rep. 986. But a presumption of delivery generally arises from the payee's possession of the paper: *Garrigus v. Home etc. Missionary Society*, 3 Ind. App. 91, 50 Am. St. Rep. 262. In other words, the possession of a note is *prima facie* evidence of its ownership and the right to sue: *Bigelow v. Burnham*, 90 Iowa, 300, 48 Am. St. Rep. 442; *Market etc. Bank v. Sargent*, 85 Me. 349, 35 Am. St. Rep. 376.

WHITESELL v. STRICKLER.

[167 Ind. 602, 78 N. E. 845.]

PLEADING—Demurrer United in by Several Parties.—When two or more parties desire to demur separately to the same pleading, on the same ground, the law does not require each to file a separate paper. If they choose, all may act separately in demurring, and yet unite in the same paper, provided that it is clearly stated therein that they act severally and not jointly. (pp. 526, 527.)

APPEAL—Several Exceptions to Overruling of Demurrer.—Where defendants “each separately and severally demurs” to the complaint, an entry that the court “overrules the separate demurrer by each of the defendants to the complaint, to which ruling the defendants except,” shows a several and not a joint exception by them. (p. 527.)

APPEAL.—A Joint Assignment of Error must, to be sufficient, be founded upon a ruling against all, and erroneous as to all; likewise a separate assignment, founded upon a joint ruling against one or more appellants, presents no question to the appellate court. (p. 528.)

APPEAL.—A Strict Construction of the Rules of procedure is usually indulged in identifying the question appealed, but where several parties for convenience unite in one paper, the exceptions to the ruling of the court thereon should be construed liberally with a view of according an appropriate exception to each exceptor. (p. 528.)

WILLS—Election by Widow.—A widow is held to have chosen under her husband’s will, unless within one year from the date of its probate she files her declaration of election to take under the law. (p. 529.)

FRAUD AND UNDUE INFLUENCE—Persons in Confidential Relations.—In all cases where the relations in life are such that influence is acquired by one and confidence reposed by another, so as to give opportunity for imposition or undue influence, and where one of the parties, by reason of his surroundings, is unable to treat with the other upon terms of equality, courts of equity will carefully scrutinize the dealings between them and compel restoration in the absence of absolute fairness. (pp. 529, 530.)

FRAUD—Procurement by Third Person.—A transaction is not purged of fraud by showing that it was brought about by a third person. (p. 532.)

WILLS—Widow’s Election Procured by Fraud or Undue Influence.—A complaint alleging that the plaintiff is a widow; that her husband devised to her all his property; that her daughter, her daughter’s husband, who was an attorney, and the circuit judge induced her to renounce the provisions of her husband’s will by representing that it was void for want of testamentary capacity; and that she subsequently found the representations false and the will not void, states a cause of action to avoid her election to take under the law instead of under the will. (p. 532.)

RES JUDICATA.—The Judgment in a Former Action settles all matters of controversy involved in the issues between the parties; that is, all matters litigated, or which might have been litigated within the issues as they were made or tendered by the pleadings, but not matters which might have been litigated under such issues formed by additional pleadings. (p. 533.)

RES JUDICATA.—Where Two or More Defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading. (p. 533.)

ESTOPPEL.—Equity will not Permit a Wrongdoer, while retaining the fruits of his wrong, to interpose an act, intentionally and wrongfully induced by him, as an estoppel as against the injured party in an action for redress. (p. 535.)

WILL.—Rescission of Widow's Election—Limitation of Actions.—Where a widow has renounced the provision which her husband made for her in his will, and elected to take under the law, she can maintain an action to rescind such election, for fraud, and undue influence, and again place herself under the will, within the general statutory period of six years. (p. 536.)

LIMITATION OF ACTIONS.—Fraudulent Concealment.—Acts constituting fraudulent concealment may precede or be concurrent with or subsequent to, the accruing of the cause of action. It is important only that they are of a character, and designed to operate after the cause of action shall arise, to prevent its discovery. (p. 536.)

JUDGE.—Waiver of Objections to.—Where a defendant makes no objection to a special judge, or to the regularity of his appointment, until after the issues are closed, he will be deemed to have waived his objections. (p. 537.)

COSTS.—The Court may Tax the Costs of a suit by a widow to rescind her election to take under the law instead of under her husband's will against the particular defendants who fraudulently procured the election to be made. (p. 537.)

COSTS.—If One of Several Defendants makes a separate issue, which is declared against him, he is liable for the costs. (p. 538.)

Samuel C. Whitesell, Downing & Hough, A. C. Lindemuth and Robbins & Starr, for the appellants.

B. F. Mason and Thomas J. Study, for the appellee.

606 **HADLEY, J.** Amos Strickler died testate in Wayne county, Indiana, October 23, 1899. He executed his will on March 10, 1889. On November 6, 1899, the will was proved, admitted to probate and duly recorded. By the terms of his will, after providing for the payment of all his debts, he bequeathed to his widow, appellee Elizabeth Strickler, all of his estate, both real and personal. The value of the estate thus bequeathed was about ten thousand dollars. Besides his widow, he left, as his only heirs, the defendants, Elmira J. Whitesell, his daughter, Minos Strickler, his son, and Russell Strickler, his grandson. After the probate of the will, the widow elected to renounce the will and take under the statute. Appellant Henry C. Starr was thereupon appointed administrator of the estate, gave bond, and proceeded to the settlement of his trust, and has converted all of the estate, both real and personal, into cash, and has the proceeds thereof, less ex-

penses, etc., in his possession. The widow, who was the plaintiff below, brought this suit to set aside her election to take under the statute, to the end that she might take under the will. She bases her right to maintain the suit upon the false and fraudulent representations made by the appellee Elmira J. Whitesell and her husband, Samuel C. Whitesell, and the judge of the Wayne circuit court. The prayer of the complaint is that appellee's said election to reject the will and take under the statute be canceled and set aside, and that the administrator of the estate be ordered and directed to pay to her all of the money in his hands after the payment of debts and costs of administration.

All of the heirs of the decedent, the administrator of the estate, and the husband of Elmira J. were made parties defendant, and appeared to the suit, and all demurred to the complaint. The demurrer to the complaint, omitting the formal parts thereof and the names of the demurring parties, is in the following words: "Each separately and severally demurs to the plaintiff's ⁶⁰⁷ complaint, and for cause of demurrer says that said amended complaint does not state facts sufficient to constitute a cause of action." The record shows that the "court overrules the separate demurrer by each of the defendants to the amended complaint, . . . to which ruling of the court the defendants object and except." All of the defendants below, except Minos O. Strickler, filed answers. A demurrer was addressed to each affirmative paragraph and each of said demurrers was sustained. All of the defendants who appeared to the suit thereupon withdrew their respective answers of general denial and elected to stand upon the affirmative answers. The defendant Minos O. Strickler, who is made an appellee here, was duly defaulted. There was then a finding and judgment for the plaintiff, setting aside her election to take under the law.

1. It is earnestly contended by counsel for appellee that under the exceptions reserved to the rulings on the demurrers to the complaint, and the several assignments of error thereon, no question upon the demurrers is presented for decision, because the record discloses separate assignments of error based upon joint exceptions. The assignments on the ruling upon the demurrers to the complaint, as made, are separate and are not joint. It will be noticed from the above quotation from the record that the exception reserved was, as termed, "by the defendants." From the nature of the proceedings up to this

point, we think it is misleading and improper to construe the plural pronoun employed by the clerk in recording the minute as characterizing the act of the defendants as being joint.

When two or more parties desire to demur separately to the same pleading, on the same ground, the law does not require each to file a separate paper. If they choose, all may act separately in demurring and yet unite in the same paper, provided it is clearly stated therein that they act severally and not jointly.

⁶⁰⁸ The demurrer under consideration, after setting forth the names of all the defendants as demurring parties, proceeds, "each separately and severally demurs, . . . and for cause of demurrer says," etc. Not only do they employ the distributive word "each" and the singular verbs "demurs" and "says," but the association of these with the words "separately" and "severally" make it too plain for argument that the paper was intended to be, and in fact was, the several demurrer of each of the defendants. It was so understood by the court, for the record goes on, "and thereupon the court overrules the separate demurrer by each of the defendants to the complaint, to which ruling of the court the defendants except." What ruling is here referred to as reserved? Certainly no other than that described immediately preceding. It could have been no other, because the record shows there was no other ruling on demurrer to the complaint. That ruling, though a separate act and in a sense in gross, is as clearly distributive in effect as if the court had repeated and announced separately the ruling against each of the six demurrants; and, the defendants all being severally, though in the same way, affected by the ruling, we see no reason why they might not unite in reserving several and appropriate exceptions: *Stamets v. Mitchenor* (1906), 165 Ind. 672, 75 N. E. 579. Furthermore, under these facts, we think the words "defendants except" mean the same as if the clerk had written, "each of the defendants excepts," which, without any question, should be construed distributively.

An appeal is allowed by the statute solely for the correction of errors of the trial court. The assignment of error is termed the complaint in this court, and must be consistent and correctly and specifically present to the court, in manner and form as presented to the lower court, the particular rulings and subject matter ⁶⁰⁹ thereof, as shown by the record to have been made and excepted to.

As a joint complaint in the trial court must be good as to all who join or good as to none, so a joint assignment to be sufficient must be founded upon a ruling against all and which must be erroneous as to all, or it will be held so as to none: *Orton v. Tilden* (1887), 110 Ind. 131, 10 N. E. 936, and cases cited. Likewise a separate assignment, founded upon a joint ruling against one or more appellants, presents no question to this court: *Green v. Heaston* (1900), 154 Ind. 127, 56 N. E. 87, and cases cited. It is the same questions that were ruled upon by the trial court, presented here in the same way, that are reviewable on appeal.

In identifying the question appealed, it is plain that the rules of procedure should be strictly construed, in fairness to the trial court, if for no better reason, but, as in this case, when two or more persons desire to take the same step, but to act separately, and for convenience unite in presenting one paper, and the court, by a single action, rules against all, the exceptions to the ruling as recorded by the clerk should be liberally construed with a view of according an appropriate exception to each exceptor. And such exception should be allowed unless clearly incompatible with the record.

When an appellant excepts to a ruling for the purpose of presenting it to a court of review, it should at least be presumed that his exception was intended to be in the capacity and relation that would make it effective. The assignments of error predicated upon the ruling on the demurrers to the complaint are several, and we think the same are supported by proper exceptions reserved at the trial. Our holdings on exceptions reserved to rulings on demurrer to the complaint in *Noonan v. Bell* (1902), 159 Ind. 329, 64 N. E. 909, and *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460, while perhaps the logical ⁶¹⁰ result of prior rulings, if pressed to an extreme, appear to us, on further consideration, as too restricted, and the same are now disapproved.

2. Was the complaint sufficient? It counts upon fraud and undue influence of the defendants Whitesell and Whitesell and the judge of the Wayne circuit court, whereby the plaintiff was induced to renounce the provisions made for her by the will of her deceased husband, and in lieu thereof accept her portion of her husband's estate under the law.

It was held in *Garn v. Garn* (1893), 135 Ind. 687, 35 N. E. 394, that the policy of the law of this state has ever been to

deal liberally with widows in the distribution of their husbands' estates. In harmony with this doctrine the statute guarantees to a widow the right of election between the provisions of her husband's will and those provided by the statute, and the right to make the same understandingly. No misrepresentation, no concealment or suppression of the facts, no appeal to family duty or obligation, will be allowed by the court to thwart her free will, and prevent her from arriving at an intelligent decision. As was said in the case of *Garn v. Garn* (1893), 135 Ind. 687, 35 N. E. 394: "Nothing less than an act intelligently done will be sufficient. She should know, and if she does not, she should be informed, of the relative values of the properties between which she is empowered to choose; in other words, her election must be made with a full knowledge of the facts. The rule applies with special force where the widow is called upon, as in this case, to make her election shortly after her husband's death."

The law recognizes the tender relation of husband and wife, and the usual liberality of a husband when he undertakes by will to make provision for the future comfort and support of the wife. Responding to this sentiment, the statute now in force—section 2666 of Burns' Revised Statutes of 1901, Acts of 1885, page 239—is so constructed that a widow will be held to have chosen under the will, unless within ⁶¹¹ one year from probate she shall file with the clerk her solemn declaration of election to take under the law. In other words, if a widow is passive and takes no action at all with respect to her election, she will conclusively be presumed to be content with the will.

It is a well-known fact that a wife who has attained to old age before the death of the husband, and who has given her life to domestic duties, and had little or no experience in business affairs or in ascertaining the current values of property, when suddenly bereaved and called upon to choose between two portions of the family estate, is, in most instances, as helpless as a minor, and feels wholly incapable of acting upon her own judgment in matters of importance. In such emergencies the natural and usual resort is to those possessed of her confidence, and whom she believes to be competent and interested in her welfare. In situations like this, and in all cases where the relations in life are such that influence is acquired by one and confidence reposed by another, so as to give rise to opportunity for imposition or undue influence,

such as arise between guardian and ward, parent and child, husband and wife, principal and agent, and the like, and where one of the parties, by reason of his surroundings, is unable to treat with the other upon terms of equality, courts of equity will carefully scrutinize the dealings between them and compel restoration in the absence of absolute fairness. In such cases, says Judge Story, the one subject to undue influence "has no free will, but stands in vinculis. And the constant rule in equity is, that where a party is not a free agent and is not equal to protecting himself, the court will protect him": 1 Story on Equity, 13th ed., sec. 239. And this rule in equity is not confined to formal relations, such as those alluded to, but extends to every case where confidence exists on one hand and influence on the other, "from whatever cause they may spring": *M'Cormick v. Malin* (1841), 5 Blackf. 509; *Burden v. Burden* (1895), 141 Ind. 471, 40 N. E. 1067; *Culley⁶¹² v. Jones* (1905), 164 Ind. 168, 73 N. E. 94; *Wheeler v. Smith* (1850), 9 How. 55, 82, 13 L. ed. 44; *Bispham on Principles of Equity*, 7th ed., sec. 232; *Kerr on Fraud and Mistake*, 2d ed., 166.

The rule we have been considering does not deny the power of the parties to contract, nor denounce all dealings between them as fraudulent, but in every such case it rests upon the superior, or party who has taken the benefit, to prove that the transaction was in every respect fair and equitable, and the free consent of him subject to the undue influence: See above authorities, *Holt v. Agnew* (1880), 67 Ala. 360; *Browne on Parol Evidence*, sec. 38.

These principles embrace the substance of the complaint. It is set forth that the plaintiff is an old woman, ignorant of the law, of value, of business, and lacking the degree of mental capacity necessary to make a will; that Elmira J. Whitesell is her daughter; that Samuel C. Whitesell is Elmira's husband, a skillful lawyer, and a practicing attorney in Wayne county; that by the provisions of the will the whole estate of Amos Strickler was bequeathed to the plaintiff; that her husband requested her to accept the provisions of the will, and she desired and intended to do so; that within a few days after the death of her husband and the probate of the will, to wit, within twelve days after the probate, Samuel C. and Elmira Whitesell—to enable Elmira to inherit a large portion of her father's estate—repeatedly represented to the plaintiff that the will of Amos Strickler was invalid and void for unsoundness of

mind of the testator, and could be set aside, and further represented to her that the judge of the Wayne circuit court, a special friend and associate of Samuel C. Whitesell, desired to see and talk with her concerning her deceased husband's estate; that, relying upon said representation, she went to the city of Richmond and to the house of Elmira J. and Samuel C. Whitesell, and after night on the day of her arrival Samuel C. Whitesell brought said ⁶¹³ judge to his house, and Samuel C. and his wife and the judge discussed with the plaintiff the mental condition of her husband when he made his will, and declared and asserted that he was incapable of making a will, that his will was invalid, and that she might better take her portion under the law; that she believed and relied upon what they claimed and asserted concerning her deceased husband, and was induced thereby to execute, and on the following day, to wit, November 18, 1899, did execute, and file with the clerk, her election to renounce the will and take under the law. It is difficult to conceive of an influence more potential than that exercised against the plaintiff as here alleged: Mr. Whitesell, the son in law, a practicing lawyer of the county, and reasonably supposed to know, or at least she had the right to presume he knew, whether, under the law and facts stated, the will was valid; his wife, her daughter, who should naturally feel the most unselfish desire for the plaintiff's future comfort and support, and when there is added the counsel and advice of the resident circuit judge, the influence brought to bear against the widow seems practically irresistible. If the will was invalid it could convey no rights, and all might be lost, and, in her lonely, inexperienced, uninformed, hesitating condition, the advice of the judge alone would hardly fail to control her action for good or ill, and for one as readily as the other. Even if there was no personal acquaintance—which is not probable in this case—it was reasonable for her to suppose, from the honorable and responsible position occupied, that the judge was a man of legal learning, and of the highest integrity. She also had the right to regard him as the final arbiter of all questions relating to the settlement of her husband's estate, and in determining the validity of her husband's will in any suit or contest that might be brought. Also the right to assume, from the request for the interview with her, that he felt an interest in her welfare, and would advise her to ⁶¹⁴ that course which was best for her to take from the perplexing situation.

It is absurd to say that the widow was on equal terms with her advisers, or in position, as against their contrary advice, to form an independent and intelligent judgment. What the judge said to her and his advice to take under the law, under the circumstances alleged, was calculated to secure acceptance and obedience as promptly as would his judgment announced from the bench; and, resulting in detriment to the widow and in benefit to the appellants, no evidence that we can conceive of can be brought to relieve the transaction of fraud. But it should be borne in mind that what is here said concerning the judge is based upon averments of the complaint, and not upon facts proved, or even testified to. It is, too, but just to the eminent jurist referred to, to state that he is a judge of long experience, and of irreproachable character, and has had no opportunity of meeting the charge. We therefore indulge no adverse presumption in relation thereto, except such as the law requires in testing the sufficiency of the complaint.

Because the judge derived no benefits from the plaintiff's election to take under the law makes no difference. The transaction is not purged of its fraud by showing that it was brought about by a third person. A delivery of the fruits to a stranger does not purify an evil deed. "I should regret," says Lord Eldon, in *Huguenin v. Baseley* (1807), 14 Ves. 273, 289, "that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud. imposition, or undue influence of others." It is not by whom, but the manner of getting, which constitutes the question: *Ranken v. Patton* (1877), 65 Mo. 378. It follows that we hold the complaint sufficient, and the demurrers thereto properly overruled.

⁶¹⁵ 3. The defendant Minos O. Strickler made default. The administrator filed a separate answer in two paragraphs—former adjudication, and the statute of the limitations of one year. Elmira J. and Samuel C. Whitesell filed a joint and separate answer in two affirmative paragraphs. The second, former adjudication. The third, estoppel. Elmira J. answered separately in two paragraphs, former recovery and estoppel, respectively. Russell Strickler, by his guardian, answered in two paragraphs, of former adjudication. The administrator's third paragraph and the joint answer of the Whitesells and Russell Strickler set up that the cause of action had not accrued to the plaintiff within one year from the

probating of the will. To each of these answers a demurrer was sustained. The Whitesells in their second, Russell Strickler in his first, and the administrator in his second paragraph, set up the same facts as *res adjudicata*. In substance they alleged that the plaintiff elected to take under the law, and the administrator thereupon filed his petition to sell the undivided two-thirds of the real estate to pay the debts of the estate. The plaintiff was made a party and filed an answer to the effect that she was the owner of an undivided one-third of the lands, and that she was not paid three hundred and forty dollars of her statutory allowance as widow, which she requested should be declared a lien on the property sold. Further proceedings are alleged that resulted in an order and sale of the undivided two-thirds of the home farm to the defendant Elmira J. Whitesell for three thousand six hundred and ten dollars and the balance of the land for two thousand one hundred and fifty dollars to a third person.

The facts pleaded in the answers last above described fall far short of being sufficient as answers of former adjudication. The general rule is that the judgment in the former action settles all matters of controversy involved in the issues between the parties to the action; that is, all matters litigated, or which might ⁶¹⁶ have been litigated within the issues as they were made, or tendered by the pleadings in the case, but not matters which might have been litigated under such issues formed by additional pleading: *Finley v. Cathcart* (1898), 149 Ind. 470, 63 Am. St. Rep. 292, 48 N. E. 586; *Duncan v. Holcomb* (1866), 26 Ind. 378. "The party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to which the latter could have demurred or pleaded": *Jones v. Vert* (1889), 121 Ind. 140, 16 Am. St. Rep. 379, 22 N. E. 882.

In an action against A and B on a note, A made default, and B answered suretyship, which was decided against him. This judgment did not operate as *res adjudicata* in a subsequent action brought by B against A alleging the same facts: *Harvey v. Osborn* (1877), 55 Ind. 535. Stated more generally, where two or more defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading: *Finley v. Cathcart*, 149 Ind. 470, 63 Am. St. Rep. 292, 48 N. E. 586.

“An answer of a former recovery must make it appear that there is an identity between the present and the previous cause of action, and that the parties in the present action are the same as in the previous one”: *State v. Page* (1878), 63 Ind. 209. See, also, *Jones v. Vert* (1889), 121 Ind. 140, 16 Am. St. Rep. 379, 22 N. E. 882.

In the former case in his petition to sell the undivided two-thirds of the land to pay debts—which petition was filed within three months after the probating of the will—the administrator tendered to the defendants, the widow and heirs, an issue to show cause, if any they had, why said land should not be sold to pay the debts of the testator. The petition alleged that the plaintiff had elected to take under the law, and she had, and so she admitted in her answer, she at that time resting innocently ⁶¹⁷ under the alleged fraud perpetrated upon her by her codefendants. At the time of filing her answer, the plaintiff had the absolute right to rescind her election, the statutory period not having expired, but if she had chosen to seek its annulment on the ground of the alleged fraud, she would have been required to implead her codefendants. This she did not do. There was no impleading of any kind between her and her codefendants. Her codefendants in the former suit are the defendants in this, except the administrator, who is here a nominal party. The subject matter of this suit is entirely different from that of the former suit, and there are, perhaps, other reasons why, under the authorities, the answers under consideration are not good.

The second paragraph of the answer of Russell Strickler counts upon a judgment of partition rendered in a suit brought by the plaintiffs Elizabeth Strickler, Minos O. Strickler, and Elmira J. Whitesell against said Russell Strickler for the division of some property in Centerville, belonging to the estate of Amos Strickler, deceased, in the petition for which Elizabeth admitted she was the owner of one-third and the other parties the owners of the balance. There was no interpleading, and the facts set up are insufficient as a former recovery for the same reasons given above.

After Elmira J. Whitesell had purchased at the administrator's sale the undivided two-thirds of the home farm, she and the plaintiff, within the statutory period for election, entered into a contract whereby the plaintiff agreed to, and did, convey to Elmira her undivided one-third of the home

farm for the expressed consideration that Elmira should furnish her mother a home on the farm and maintain her as long as she lived. Upon the faith of said conveyance Elmira expended two thousand dollars for repairs and betterment of the farm. The Whitesells jointly and Elmira separately rely upon these facts, and a ⁶¹⁸ vast amount of irrelevant and evidentiary matter provable under the general denial, to estop the plaintiff from now claiming the fund in the hands of the administrator. It should be borne in mind that the plaintiff is not seeking to disturb a judgment, or anyone's title to the property conveyed by the administrator or herself, but only seeks to be restored to her rights in the proceeds of the property remaining in the possession of the administrator after the payment of debts and expenses of administration. No rights of innocent third persons contravene, and no part of the controversy can affect anyone but the parties to the original fraud charged. Refraining from analysis and extended argument, we deem it sufficient to say that equity will not permit a wrongdoer, while retaining the fruits of his wrong, to interpose an act, intentionally and wrongfully induced by him, as an estoppel against the injured party in an action for redress. One seeking equity must be able to show that he himself has clean hands. The demurrers to the answers in estoppel were rightly sustained. We are also of the opinion that the limitation pleaded by the administrator and the other defendants as above noted, in bar of the complaint, is inapplicable and insufficient.

As we have seen, if a widow is content with the provision made for her by the will, it is not important under section 2666 of Burns' Revised Statutes of 1901, Acts of 1885, page 239, that she make and file with the clerk her formal election. Her silence and inaction will be held evidence of an acceptance of the will, and, if continued for more than one year from the probate, will be held as conclusive evidence of acceptance.

Under the statute it is clear that if she desires to change or rescind her choice, formed in favor of the will, to that of the law, she must do so within the statutory period: *Garn v. Garn* (1893), 135 Ind. 687, 35 N. E. 394. That is, if the testamentary provision is to be annulled in favor of the statutory provision, it must be done within ⁶¹⁹ one year from the date of probate, but if she seeks to rescind her election to take under the law and again place herself under the will after the expiration of the year, for fraud, as in this

case, she may bring her action within the general statutory period. There is no statute of limitations governing this suit other than the six-year statute, and she is only required, as in other cases in equity, to excuse any apparent delay. With this in view she alleges in the complaint that, at the time Elmira J. and Samuel C. Whitesell and the circuit judge induced her to take the statutory portion in lieu of the testamentary provision, they requested and urged upon her not to tell anyone of the meeting, or of what had been said to her by the judge, or other party in his presence, concerning her husband's want of testamentary capacity, or the invalidity of his will, as the judge had no right to advise her in relation to such matters, and, believing that such representations were true and made in good faith, and relying on them, she was induced thereby to tell no one anything that was said to her concerning her husband's mental condition and the invalidity of his will, or of the meeting, or of what occurred therein, until a few weeks—the exact time she cannot state—prior to the commencement of this suit, when, becoming suspicious that said representations concerning her husband and his will might not be true, she took legal advice, and for the first time learned and discovered that said statements were false, and that her husband did have testamentary capacity when he executed his will, and that said will was valid, and that said false statements and advice were but a fraudulent scheme to induce her to reject the provisions made for her by her husband in his will. These facts we think fully excuse the delay, and show that she brought the action within a reasonable time after the discovery of the fraud. The complaint makes it plain that it was undue influence on the one side and undue confidence on the other that ⁶²⁰ led the plaintiff to surrender the whole for a part of her husband's estate; and the same influence that induced her to make the election was well calculated to lull her into silent resignation, and prevent inquiry and investigation.

There is nothing in the point that a cause of action cannot be concealed before it exists. It is well settled that acts constituting fraudulent concealment may precede, be concurrent with, or subsequent to, the accruing of the cause of action. It is only important that such acts are of a character, and designed to operate after the cause of action shall arise, to prevent its discovery: *Jackson v. Jackson* (1898), 149 Ind. 238, 47 N. E. 963.

4. This cause originated in the Wayne circuit court. The regular presiding judge of which court is the same person referred to in the complaint as having joined the Whitesells in advising the plaintiff. The venue of the cause was changed from the Wayne circuit court to the Henry circuit court and from the latter to the Hancock circuit court. The proceedings in the Wayne circuit court as disclosed by the certified transcript to the Henry circuit court were signed by "John M. Smith, special judge." In the Hancock circuit court the defendant Russell Strickler, after appearing and demurring to the complaint, excepting to the ruling, and filing his answers to the merits, moved to strike the cause from that docket, and remand the same to the Wayne circuit court, because it did not appear that the Wayne circuit judge was in any way disqualified, or that Smith was appointed special judge. This defendant at that time made no objection to the special judge sitting in the case, or to the regularity of his appointment, and all such objections will now be deemed waived. "A practice that would permit a party litigant to proceed for months before a de facto judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then if not satisfied with some of his rulings, or not disposed ⁶²¹ to go into trial, when the cause is ready for trial, to be able, in a moment, to arrest proceedings, and oust the jurisdiction of the judge, cannot be tolerated": *Lillie v. Trentman* (1890), 130 Ind. 16, 29 N. E. 405. There was no error in overruling the motion to remand.

The court gave the plaintiff judgment for costs against the defendants Elmira J. and Samuel C. Whitesell, to which they reserved an exception. Section 603 of Burns' Revised Statutes of 1901, section 594 of the Revised Statutes of 1881, provides that when there are several defendants, the costs shall be apportioned according to the judgment rendered upon the issue. The only issue tendered by the complaint was the alleged fraud of Elmira J. and Samuel C. Whitesell. No fraud or wrongdoing was charged against any other defendant. The administrator was but a nominal party. He was only the custodian of the fund the others were lawing over. Minos O. Strickler made no defense. Russell Strickler's defense rested wholly upon the Whitesell's defense. The plaintiff was successful. In such a case the judgment of the court apportioning the cost will be presumed correct: *Miller v. Dill* (1898), 149 Ind. 326, 49 N. E. 272.

It is further held under said section that if one of several defendants makes a separate issue, which shall be declared against him, he is liable for the costs: *Reynolds v. Bond* (1882), 83 Ind. 36; *Boyd v. Jackson* (1882), 82 Ind. 525. We perceive no reason why we should disturb the judgment. We find no error in the record.

Judgment affirmed.

The Election of a Widow between the provision made for her in her husband's will and the provision which the law makes for her is discussed in the note to *Matter of Gordon*, 92 Am. St. Rep. 695. An election made in ignorance of the facts may be repudiated by her if she acts seasonably: *Estate of Woodburn*, 138 Pa. 606, 21 Am. St. Rep. 932.

CASES
IN THE
SUPREME COURT
OF
IOWA.

**UNITED STATES STANDARD VOTING MACHINE
COMPANY and BOARD OF SUPERVISORS OF
WINNESHIEK COUNTY v. HOBSON.**

[132 Iowa, 38, 109 N. W. 458.]

CERTIORARI—When Appropriate Remedy.—An appeal from an order restraining the use of voting machines which cannot be determined until after election is not such an adequate remedy as precludes a resort to proceedings by certiorari to test the validity of the order on the ground of its being in excess of jurisdiction. (p. 544.)

ELECTIONS.—The Right to Vote is a Political, not a civil, right. (p. 544.)

INJUNCTION—Political Rights.—A court of equity will not exercise its extraordinary power of injunction to protect a mere political, as distinguished from a civil, right. (p. 544.)

ELECTIONS—Voting Machines.—A Court of Equity has no jurisdiction to restrain the use of voting machines at an election. (p. 546.)

ELECTIONS—Voting Machines.—A Statute authorizing the use of voting machines is not unconstitutional. (p. 547.)

Read & Read, J. K. Macomber and Frank Keiper, for the plaintiffs.

N. Willett, E. R. Acres and C. M. Houck, for the defendant.

³⁸ Per CURIAM. This is a proceeding by certiorari to annul that portion of an order entered by the defendant as judge of the thirteenth judicial district, holding the district court in and for Winneshiek county, granting a temporary injunction at the suit of one H. C. Hjerleid, plaintiff, in an action brought in equity against Winneshiek county, the board of supervisors, and the auditor of said county, and the United States Standard Voting Machine Company, as defendants,

by which the defendants in that action (except the voting ³⁹ machine company, which had not at that time been served with notice) were enjoined and restrained from the use at the election of November, 1906, in said county, of voting machines, sold or contracted to be sold or furnished to said county by the voting machine company. The other portion of the restraining order, of which no complaint is made in this proceeding, enjoined and restrained the same defendants from paying for said machines either in cash, warrants, or bonds, or in any other manner, or from issuing warrants, orders, or bonds in payment therefor.

The allegations of the petition in the injunction suit, so far as material to the determination of the question whether the portion of the restraining order complained of was proper, were, in brief (as appears by the return made by the defendant in this proceeding to the writ of certiorari issued from this court), that plaintiff, Hjerleid, was a resident, voter and taxpayer of Winneshiek county; that on or about the eighth day of June, 1906, the defendant, the United States Standard Voting Machine Company, presented to the defendant board of supervisors its written proposal to sell on trial to the defendant county certain voting machines, to be used at the November, 1906, election; that said proposal was accepted and adopted by the defendant board of supervisors; that subsequently a certain agreement in the nature of a contract between the voting machine company and the defendant county was approved by the defendant board of supervisors and signed by the chairman thereof under the authority of the said board; that, in securing the adoption of the written proposal and the contract above referred to, certain representations were made by the voting machine company which were false and fraudulent, in that the contract was not, as understood by the board of supervisors, an embodiment of the written proposal, but amounted to an absolute barter and sale contract with a guaranty, and not a conditional contract as intended by said board, and that the board of supervisors never passed any other resolution ⁴⁰ or adopted any other contract than that authorizing the use of United States Standard voting machines on trial at the November, 1906, election in said county; that the alleged contract above referred to was absolutely void, for the reason that there is no law authorizing the use at elections in Iowa of voting machines, and that title 6, chapter 3a of the Code of Iowa (Sup-

plement of 1902), is unconstitutional; that the commissioners appointed under and by virtue of the authority conferred by section 1137c of chapter 3a, title 6 of the Code of Iowa (Supplement of 1902), has not approved said machines since the enactment of the constitutional amendment relating to biennial elections, nor since the acts of the Thirty-first General Assembly of Iowa in relation thereto, and that such approval was necessary to authorize the defendant board of supervisors to enter into any contract for the purchase of such machines; that section 1137e of said chapter 3a, relating to the use of voting machines, and providing that one ballot may be placed in each party column or row containing only the words "Presidential Electors," preceded by the party name, and that a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors, is unconstitutional and violative of the constitutional amendment with reference to biennial elections, in not affording to the individual voter an opportunity to pass personal choice upon each and every candidate for office; that the voting machines referred to in the proposal and contract were inadequate and their use illegal, and not in conformity with the requirements of the laws of the Thirty-first General Assembly with reference to elections, inasmuch as their construction permitted the use of so-called party levers, which substantially nullified the effect and purpose of the statute removing the circle from the official ballot; that plaintiff was a duly qualified voter, and the use of said machine for voting purposes was not a vote or voting by ballot, and that their said use at said election would be unconstitutional and would nullify ⁴¹ such election, causing great expense and trouble to the people of said county, including the plaintiff; and that by the terms of the contract above referred to it was provided that the defendant county would at its meeting in November, 1906, pay to the defendant the voting machine company for said machines the sum of seventeen thousand five hundred and fifty dollars, and that, unless restrained by injunction, the defendant voting machine company would deliver to defendant county the said twenty-seven voting machines, and the said county would, in pursuance of said contract, accept said machines and pay to the defendant voting machine company the purchase price thereof, and the property of the plaintiff and of the other taxpayers throughout said county would be taxed to raise funds for the payment of said sum, and, unless restrained, the said

machines would be used at said November election, making it impossible thereafter to replace the parties defendant in statu quo, and plaintiff would be remediless at law to recover his loss or protect his said rights, and that plaintiff had no plain, speedy and adequate remedy at law.

In a motion submitted with the case, the defendant asks that the petition for a writ of certiorari be dismissed, and the writ be quashed; but in the main the grounds urged in the motion are such as may be considered in passing upon the merits of the case, involving the legality of defendant's action in making the portion of the order which restrains the county of Winneshiek and its board of supervisors and auditor from using the voting machines referred to in the action of the board at the November election. It is urged, however, that the plaintiffs in this action, having ⁴² subsequently appeared in the injunction suit as defendants, filed an answer therein, and otherwise raised issues of law and fact, have a plain, speedy and adequate remedy by appeal. With reference to the filing of the subsequent pleadings in the injunction suit, to which reference is made in the motion to dismiss the petition and quash the writ, it is sufficient to say that, whatever may have been the effect of such action on the part of the defendants in the injunction suit, the facts do not appear by the return, nor in any other manner, such as would enable us to take notice of them, and therefore they need not be considered. But, even if they were to be considered, we cannot see that they would affect the present proceedings, for the injunction suit was still pending, and the portion of the order restraining the county and its board of supervisors and auditor from carrying out the contract with the voting machine company, by accepting the machines and paying therefor under the terms of the alleged contract, was still in force. The voting machine company was still in court for a proper purpose, regardless of the validity of that portion of the restraining order questioned in this proceeding.

As to the ground of the motion involving the claim that the plaintiffs cannot maintain this certiorari proceeding, because they have a plain, speedy and adequate remedy by appeal from the order granting the temporary injunction, it is enough to say, briefly, that in our judgment the right to appeal does not preclude plaintiffs from questioning the validity of the portion of the order complained of, on the ground that it was made in excess of jurisdiction, and is therefore void and

should be annulled. It is provided in Code, section 4154, that: "The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded its proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate ⁴³ remedy." It is contended in behalf of plaintiff that "other plain, speedy and adequate remedy" is only a limitation of the power to issue the writ where the tribunal exercising judicial functions is alleged to be "otherwise acting illegally," and that it has no application to a case where an inferior tribunal is alleged to "have exceeded its proper jurisdiction." But we think that the correctness of this view need not be passed upon, in view of our conclusion that the remedy by appeal is not such plain, speedy and adequate remedy as to preclude the right to test the validity of the order in question, as against the complaint that it was made without jurisdiction. Of course, the right of certiorari is not available to correct mere irregularities or errors in the proceedings of the lower court. It may be that illegality of action, where the court has jurisdiction, may sometimes be tested by certiorari, and, in such a case, the want of a plain, speedy and adequate remedy by appeal may be important. But where the action complained of is in excess of the jurisdiction of the court, it is doubtful whether the remedy by appeal is ever plain, speedy and adequate. Certainly, in this case an appeal would neither have been speedy nor adequate, for it would have postponed any test of the validity of the order prohibiting the use of voting machines at the November election of this year until long after the election had been held. In a case involving an injunction to test the title to an office, when the term of office would probably expire before the appeal could be heard and decided, this pertinent language was used in *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393, with reference to a writ of prohibition, serving the same purpose, as we understand it, that is served by the writ of certiorari under our procedure:

"It is also contended by learned counsel that relators had their remedy by motion to dissolve, and by appeal on final judgment. Prohibition is an extraordinary remedy, and will not lie where a party claiming it has adequate ⁴⁴ remedy by ordinary means. But the ordinary means that will defeat the application for this extraordinary writ must be sufficient to

afford the relief the case demands. If the relators should wait to follow the course pointed out by their adversaries, it would, in all probability, be a year before their appeal could be heard and decided, and it would be perhaps two years, if the cause took its regular course without advancement, both in the trial and appellate courts."

In our own cases we find nothing to indicate that an appeal is a speedy and adequate remedy, where the question is as to want of jurisdiction to make the order complained of. Indeed, it is a justifiable inference, from those cases where the question of the adequacy of the remedy by appeal has been considered, that such remedy would not preclude resort to certiorari, if the jurisdiction of the subject matter were the question involved: See *State v. Schmitz*, 65 Iowa, 566, 22 N. W. 673; *Abney v. Clark*, 87 Iowa, 727, 55 N. W. 6; *Callanan v. Lewis*, 79 Iowa, 452, 44 N. W. 892. We are clear that, in this case at least, the remedy by appeal, to which plaintiff might have resorted, was not such a speedy and adequate remedy as to preclude his resort to this proceeding by certiorari.

On the merits of the case, as made by the return to the writ, the position strongly relied upon for plaintiff is that the lower court had no power or authority, under the allegations of the petition for injunction, to interfere with the use of voting machines at the November election, 1906, as provided for by the board of supervisors. And to this broad proposition we shall now direct our attention, without attempting to follow the course of argument mapped out by counsel on either side. The right to vote is a political, and not a civil, right, and a court of equity will not exercise its extraordinary power of injunction to protect a mere political right as distinct from a civil right. The plaintiff in the injunction case, as a taxpayer, could no doubt have relief by injunction to prevent the board of supervisors and the county auditor, defendants in that action, from attempting to carry out a contract which⁴⁵ would impose an unlawful indebtedness upon the county; but as a taxpayer, he had no interest in the question whether or not the November election in the county should be held by means of voting machines, and, as a voter, he had no interest in the method of conducting the election which would entitle him to control that method by the assistance of a court of equity. Some remedy at law he would, no doubt, have, if his right to vote were interfered with; but a court of law would not give him relief as against a mere anticipated wrong. It

is to be noticed that the want of jurisdiction of the lower court to grant relief in equity was not on account of the want of right of the plaintiff in the injunction suit to maintain the action, but on account of the absence of any equitable right to relief on the part of anyone, and therefore the want of jurisdiction did not grow out of the incapacity of the particular plaintiff, but out of the incapacity of any plaintiff, to have such remedy. Therefore, the question is not as to the capacity of the plaintiff to sue, but the power of the court to give the attempted relief.

That courts of equity cannot interfere by injunction to protect a claimed political right is too well settled to require extended discussion. A few references to illustrations found in adjudicated cases will show the reasonableness and propriety of this rule. In *Fletcher v. Tuttle*, 151 Ill. 41, 42 Am. St. Rep. 220, 37 N. E. 683, 25 L. R. A. 143, the question was as to the jurisdiction of a court of equity to grant an injunction to prevent the giving of election notices, or the certifying of nominees for districts created by an apportionment act which was claimed to be unconstitutional, and the court, holding that an injunction could not be granted for the protection of a political, as distinguished from a civil or property, right, used this language: "The complainant is a legal voter and a candidate for a particular elective office, and by his bill he is seeking the protection and enforcement of his right to cast his own ballot in a legal and effective manner, and also his right to be such candidate, ⁴⁶ to have the election called and held under the provisions of a valid law, and to have his name printed upon the ballots to be used at such election, so that he may be voted for in a legal manner. The rights thus asserted are all purely political, nor, so far as this question is concerned, is the matter aided in the least by the attempt made by the complainant to litigate on behalf of other voters, or of the people of the state generally. The claims thus attempted to be set up are all of the same nature and are none the less political." And, further, the court says: "The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These

matters involve in themselves no property rights, but appertain solely to the political administration of government. If a public officer charged with political administration has disobeyed, or threatens to disobey, the mandate of the law, whether in respect to calling or conducting an election, or otherwise, the party injured or threatened with injury in his political rights is not without remedy, but his remedy must be sought in a court of law, and not in a court of chancery."

In the case of *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393, already referred to, involving the right of a court of equity to enjoin the entrance of a person to office and to declare his title invalid, this language is used: "The real and only purpose of the suit in the circuit court was to bar the entrance to the office of the board of election commissioners by injunction, and to obtain a decree of a chancery court, declaring relator's title to the office invalid. This is a subject over which a chancery court has no jurisdiction. The courts of law are open to all persons ⁴⁷ who have rights of that nature which have been violated, and ample means are afforded in those courts for the vindication of such rights and the redress of their wrongs." And, after saying that the powers of a court of chancery cannot be invoked to protect by injunction purely political rights, the court continues: "No such jurisdiction has ever been conceded to a chancery court, either in a federal or state judiciary. The political rights of a citizen are as sacred as are his rights to personal liberty or property, but he must go to a court of law for them. A court of equity is a one-man power, wielding the strong force of injunction, often issued at chambers, and on an ex parte hearing. Neither in England nor America has this power been suffered to extend to political affairs." Without further quotation, it will be sufficient to cite the following additional cases supporting the general proposition that a court of equity cannot interfere by injunction, to protect political rights: *Georgia v. Stanton*, 73 U. S. (6 Wall.) 50, 18 L. ed. 721; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. ed. 402; *Shoemaker v. Des Moines*, 129 Iowa, 244, 105 N. W. 520, 3 L. R. A., N. S., 382.

The conclusion is inevitable that, so far as the order of the lower court restrains the use of voting machines authorized by the board of supervisors to be used at the November election, it is beyond the jurisdiction and power of the court to make, and is void.

But by way of illustrating the kind of questions which a court of equity would be compelled to pass upon and made determinative of the method of conducting elections, if the power which the lower court has attempted to exercise were held to be within its jurisdiction, we may refer to a few of the most important grounds presented to the lower court for granting a preliminary injunction. It is urged that the statute (Code Supp. 1902, secs. 1137a-1137u) authorizing the use of voting machines is unconstitutional because of the provision in the state constitution (article 2, section 6) that: "All elections by the ⁴⁸ people shall be by ballot." In other words, the lower court was asked to interfere with a policy of the state declared by the legislature, unquestioned for six years, and in accordance with which elections have already been held in some of the counties and will doubtless be held in many more, whatever the result of the determination of the lower court on final hearing may be; for the action of that court can only be binding on parties to the suit, and the state of Iowa, under whose authority the county of Winne-shiek acted in adopting voting machines, is not, and cannot be, a party to that suit or any other for the determination of the question. If such power exists in a court of equity, then the method of conducting elections provided for under this or any other law may be interfered with and set aside. It has been held, however, that voting by such a machine is voting by ballot: *City of Detroit v. Board of Inspectors of Election*, 139 Mich. 548, 102 N. W. 1029, 69 L. R. A. 184; *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 723. Without elaborating the discussion, it is enough to say that the constitutional provision was intended to require and protect the secrecy of the ballot with the general purpose of guarding against intimidation, securing freedom in the exercise of the elective franchise, and reducing to a minimum the incentives to bribery: *Ex parte Arnold*, 128 Mo. 260, 49 Am. St. Rep. 559, 30 S. W. 768, 33 L. R. A. 386; and see cases referred to in those above cited. In no case, so far as we can discover, has the use of a voting machine been held unconstitutional. In Massachusetts the supreme court divided on the question whether a vote cast by means of such machine was a "written vote," within the language of the constitution of that state, and three judges held that it was. Under the constitution of Rhode Island requiring voting by ballot, it was held that a provision for voting machines was constitutional, the court

saying: "The primary meaning of 'ballot,' which signified a little ball, was not the one intended, but the broader meaning which has been substituted for the word by reason of the ⁴⁹ change in the mode of voting from little balls to that of paper vote." We see no merit in the contention that the provision for use of voting machines is unconstitutional, and that an election in that method would be invalid.

It is urged by counsel that the machine adopted by the board of supervisors has not been approved by the commissioners provided for in Code Supplement of 1902, sections 1137c, 1137d. But they admit that the commissioners did approve of this very machine; the real claim now made being that such approval was prior to the recent constitutional amendment providing for biennial elections, and prior to the enactment of the recent statute striking the circle from the Australian ballot. The biennial election amendment makes no change in the method of conducting elections, and the statute referred to does not amend or repeal the provisions as to the use of voting machines. We see no reason for saying that a vote cast by means of an authorized machine will not be as valid and effectual as one cast by Australian ballot in accordance with the latest statute on the subject.

It is claimed that the machine adopted has not sufficient capacity for the number of candidates to be voted for in 1908, when presidential electors must be chosen; but this suit relates to the election of 1906, and the lower court was not called upon to determine the sufficiency of the machine for 1908. So far as the validity of the order preventing the use of the machine at the coming election is involved, it is wholly unnecessary to discuss the validity of the contract between the county and the voting machine company. That is left for determination in the lower court. The use of the machine under the adoption thereof by the board of supervisors for trial (the validity of which is not questioned) cannot possibly fasten upon the county any contract which the board of supervisors had no authority to make, or did not in fact make.

In conclusion, we need only reaffirm the proposition already announced, that the lower court had no power or jurisdiction ⁵⁰ to interfere with the use at the coming election in Winneshiek county of voting machines duly authorized to be used. And especially should there be no such interference where the plain purpose of the suit is not to secure a valid

election, but to determine contract rights as between the county and a voting machine company, which rights can be fully adjusted in proper proceedings without prohibiting the conducting of a public election by methods authorized by law.

The part of the order of the lower court brought before us for review is therefore annulled.

The Scope of the Writ of Certiorari is the subject of a note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29.

The Jurisdiction of Equity to Interfere in matters involving elections and the exercise of the right to vote is discussed in *Fletcher v. Tuttle*, 151 Ill. 41, 42 Am. St. Rep. 220; *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296; *Kearns v. Howley*, 188 Pa. 116, 68 Am. St. Rep. 852; *Alderson v. Commissioners*, 32 W. Va. 640, 25 Am. St. Rep. 840.

Statutes Authorizing the Use of Voting Machines are constitutional: *Detroit v. Board of Inspectors of Election*, 139 Mich. 548, 111 Am. St. Rep. 430.

CRARY v. KURTZ.

[132 Iowa, 105, 105 N. W. 590, 109 N. W. 452.]

SUBSTITUTION OF PARTIES—Supplemental Pleading.—

When a debtor, pending suit to set aside certain conveyances as fraudulent, is adjudged a bankrupt and a trustee is appointed, the trustee may be substituted as plaintiff without the filing of any additional pleading. (p. 552.)

FRAUDULENT CONVEYANCE—Allegation of Insolvency.—

In an action to set aside a fraudulent conveyance it is not necessary to allege and prove the insolvency of the grantor at the time of the transfer. (p. 552.)

FRAUDULENT CONVEYANCE—Presumption of Fraud.—

A voluntary conveyance which will defeat the collection of an existing indebtedness, because of the insolvency of the grantor, is presumed to be made for that purpose. (p. 553.)

FRAUDULENT CONVEYANCE.—The Reduction of Creditors'

Claims to Judgment is not a condition precedent to the right of a trustee in bankruptcy to have a conveyance of the bankrupt set aside as fraudulent. (p. 554.)

FRAUDULENT CONVEYANCE.—A Trustee in Bankruptcy

cannot maintain an action to set aside as fraudulent a conveyance of the bankrupt, unless he alleges and proves that the claims of creditors have been filed and allowed as contemplated by law. (p. 555.)

Anthony C. Daly and Boardman, Aldrich & Lawrence, for the appellant.

Meeker & Meeker, for the appellee.

¹⁰⁶ LADD, J. Suit was begun by Charles A. Buckwalk and F. S. Widl, creditors of Joseph Kurtz, on August 20, ¹⁰⁷ 1903, to enforce contribution by the latter as cosurety with them on certain promissory notes of the Kurtz Wagon Company which they had paid. Besides judgment for Kurtz's pro rata share, plaintiffs prayed that a certain conveyance of about two hundred and eight acres of land, executed August 11, 1902, by Kurtz to his wife Teresa, be set aside and the judgment be enforced against the same. The defendants filed separate answers October 20, 1903, and on January 11, 1904, George E. Crary, as trustee in bankruptcy of the estate of Joseph Kurtz, moved that he be substituted as party plaintiff in the suit instead of Buckwald and Widl. Attached to the motion was a copy of a petition to the referee in bankruptcy, praying for authority to prosecute the suit to the end that the lien and security acquired by these creditors be preserved for the benefit of the estate, and the order of the referee directing the trustee to procure himself to be substituted as plaintiff and prosecute the case. The court sustained the motion, and ordered that "Geo. E. Crary, trustee in bankruptcy, is substituted party plaintiff." But no amendment to the petition nor supplemental pleading was filed, and for this reason appellant insists that plaintiff's petition should have been dismissed. Section 3459 of the Code declares that "every action must be prosecuted in the name of the real party in interest," and section 3476 that "no action shall abate by the transfer of any interest therein during its pendency, and new parties may be brought in, as may be necessary." The method of bringing in new parties is not pointed out, but, where the cause of action has been transferred, this is ordinarily by motion of the party desiring to be substituted as plaintiff: *Ferry v. Page*, 8 Iowa, 455; *Lindsey v. Lindsey*, 28 Ga. 169; *Chicago Legal News Co. v. Browne*, 103 Ill. 317; *Firman v. Bateman*, 2 Utah, 268; 20 Ency. of Pl. & Pr. 1050. And, as a general rule, the substituted party takes up the prosecution or defense at the point where the original party left it, assuming the burdens ¹⁰⁸ as well as receiving the benefits: *Bixby v. Blair*, 56 Iowa, 416, 9 N. W. 318; *Fannon v. Robinson*, 10 Iowa, 272; 20 Ency. of Pl. & Pr. 1061.

There is some difference of opinion, however, as to whether any additional pleading is essential. In *Campbell v. West*, 93 Cal. 653, 29 Pac. 219, a supplemental pleading was held

to be necessary, and in *Ford v. Bushard*, 116 Cal. 273, 48 Pac. 119, the court adjudged that "the assignee is entitled to be substituted upon a showing of probable cause, but the defendant is not thereby precluded from denying such assignment; and, if he does so, the fact must be determined by the preponderance of evidence, as in the case of other issues." But in *Campbell v. Irvine*, 17 Mont. 476, 43 Pac. 626, the court, construing a statute of that state, approved a ruling that the action might be continued by the successor in interest without additional pleading. In *Virgin v. Brubaker*, 4 Nev. 31, after a careful consideration of the question, the court concluded that, as the substitution is with the original plaintiff's consent, supplemental pleadings are unnecessary, saying: "Usually an assignee must allege and prove the assignment to sustain an action in his own name. If it were not so, a pretended assignee might recover a judgment, and afterward the original owner of the claim recover a second judgment for the same demand. But this could not be in the case where the original plaintiff assents to the substitution. The issues are between the original parties, and no change of pleading is required. If the judgment goes for plaintiff, it is simply entered up in the name of the assignee, instead of being entered for the original plaintiff, and then assigned after judgment, as it would have been under the old practice."

In *Smith v. Zalinski*, 94 N. Y. 519, the court in construing the statutes of that state held that unless the court in ordering substitution directs the amendment of the pleadings, the right to be substituted cannot thereafter be raised. It is not to be doubted that in every case the defendant is¹⁰⁰ entitled at some time and in some way to contest, if he shall please, the title of the transferee, but, if he is granted that opportunity, he has no right to complain, if refused it a second time. Such a transfer of interest is usually a formal matter in which the defendant has no concern, except to be protected from a double claim. In all other respects the issues in litigation ordinarily remain unchanged, and they only are to be tried. The application for substitution raises the issue as to whether there has been a change in ownership such as is alleged, and, unless this is admitted, it must be established by competent evidence before the order of substitution will be entered: *Chisholm v. Clitherall*, 12 Minn. 375 (Gil. 251); *Smith v. Harrington*, 3 Wyo. 503, 27 Pac. 803;

Kemper v. King, 11 Mo. App. 116; *Smith v. Zalinski*, 94 N. Y. 519. This may be upon terms, and, where the right of substitution is contested, the court may well require the new party to file a supplemental pleading alleging the facts upon which the transfer of the original party's interest is predicated. If these are put in issue by the answer, or the transfer is questioned therein or by amendments thereto, in the absence of a supplemental pleading, the substituted party's right to maintain the action must be established the same as any other issue: *Ferry v. Page*, 8 Iowa, 455; *Ford v. Bushard*, 116 Cal. 273, 48 Pac. 119.

But where the transfer of interest is admitted, or at least not disputed in the hearing on the motion, and no objection thereto is thereafter raised, we perceive no reason for not regarding the ruling on the application for substitution as an adjudication of the question, and thereafter treating the substituted party as standing in the place and stead of the original party. In *Firman v. Bateman*, 2 Utah, 268, an assignee in bankruptcy was substituted for the original plaintiff. On the trial evidence of the assignment in bankruptcy was objected to, but the court held such proof unnecessary, as no objection had been made to the order of substitution. ¹¹⁰ To the same effect, see *Virgin v. Brubaker*, 4 Nev. 31. Also, see *Keller v. Miller*, 17 Ind. 206.

In the case at bar the applicant for substitution was a trustee in bankruptcy. His right thereto was purely one of law. The court in ruling on the motion necessarily determined, first, that Kurtz, the debtor, had been adjudged bankrupt, and, second, that George E. Crary had been duly appointed the trustee of his estate. No more than the bare allegation of his representative capacity would in any event have been necessary, and this could not have been put in issue, save by pleading the facts relied on: Code, secs. 3627, 3628. The order determined the legal capacity in which the trustee was substituted as plaintiff, and in the absence of any subsequent question as to the correctness of the ruling, we think it should be regarded as final.

2. Exception is taken to the omission of an allegation in the petition that Kurtz was insolvent at the time he executed the conveyance to his wife. This was unnecessary: *Rounds v. Green*, 29 Minn. 139, 12 N. W. 454; *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9. Nor was it necessary to prove insolvency at that time: *Banning v. Purinton*, 105

Iowa, 642, 75 N. W. 639. Such evidence, however, is often very material in ascertaining the purpose of the conveyance.

3. The conveyance of the land by Kurtz to his wife was without consideration. At that time he was liable as surety on the notes of Kurtz Wagon Company. The payment of these by his cosureties is presumed to have been upon his implied request and promise to contribute his just portion, and therefore the debt due them grew out of, and in a sense was, a continuation of a part of his original obligation as surety. This being true, and it appearing from the adjudication that he was a bankrupt, that he was insolvent at the time of the trial, the conveyance is presumed to have been fraudulent. In other words, a voluntary conveyance which, if allowed ¹¹¹ to stand, will defeat the collection of an indebtedness existing at that time, because of the present insolvency of the debtor, is presumed, in the absence of evidence to the contrary, to have been executed for that purpose: *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Elwell v. Walker*, 52 Iowa, 256, 3 N. W. 64; *Carson v. Foley*, 1 Iowa, 524. The burden of proof was upon the defendant to show that Kurtz retained ample means after the conveyance to satisfy all his debts, and that the gift was not unreasonable in view of his financial situation. No evidence of the kind was introduced, and for this reason the presumption as to the fraudulent character of the transfer prevails.

4. The claims of Buckwald and Widl were never reduced to judgment. Evidence tending to establish Kurtz's indebtedness to them and others was introduced, but, as judgment could not have been entered in favor of the trustee, there was no necessity of interposing a defense, even though one existed. Nor was it made to appear that the claims of any creditors had ever been filed or allowed in the bankruptcy court. The proposition that, before the validity of a transfer of property by the debtor to a third person can be questioned, the creditor or his representative must have completed his title at law, has always been recognized in this state. "The reason of the rule," said Wright, C. J., in *Buchanan v. Marsh*, 17 Iowa, 494, "is that until the creditor has established his title, or his debt, by the judgment of a court, he has no right to interfere; for, unless he has a certain claim upon the property of the debtor, he has no concern with his frauds": *Clark v. Raymond*, 84 Iowa, 251,

50 N. W. 268; *Goode v. Garrity*, 75 Iowa, 713, 38 N. W. 150. And ordinarily the judgment must be such as to constitute a lien on the debtor's property: *Peterson v. Gittings*, 107 Iowa, 306, 77 N. W. 1056. This latter rule, however, is not inexorable, for in some cases a judgment against the debtor cannot be obtained, as where he is dead: *Cooley v. Brown*, 30 Iowa, 112 470; *Harlin v. Stevenson*, 30 Iowa, 371; *Doe v. Clark*, 42 Iowa, 123. Or, where the debtor has assigned for the benefit of creditors, his assignee cannot obtain judgment: *Schaller v. Wright*, 70 Iowa, 667, 28 N. W. 460; *Mehlhop v. Ellsworth*, 95 Iowa, 657, 64 N. W. 638. Other exceptions are noted in *Smith's Equitable Remedies*, sec. 167.

A trustee in bankruptcy is in a like situation. By section 11 of the act of Congress approved July 1, 1898 (30 Stats. 549, c. 541 [U. S. Comp. Stats. 1901, 3426]), all actions founded on claims which a discharge in bankruptcy would release, pending at the time of the petition, are to be stayed until after the adjudication or the dismissal of the petition; and, if such person be adjudged a bankrupt, such suits are to be stayed until twelve months after the date of such adjudication, or if, within that time, such person applies for discharge, then until the question of such discharge is determined. If, then, the creditor had not obtained a judgment before petition filed, he cannot do so until after the discharge. But such discharge releases the bankrupt from all probable debts, except such as are mentioned in section 17, 30 Statute, 550, 551 (U. S. Comp. Stats. 1901, 3428). In the meantime the trustee is vested, by section 70 (30 Stats. 565, 566 [U. S. Comp. Stats. 1901, 3452]), with all the rights the creditors had to avoid transfer made by the debtor. The creditors could not sue and obtain judgment pending the bankruptcy proceedings. No such authority is conferred on the trustee. In short, the creditors are prevented by the paramount act of Congress from obtaining judgment upon which to base the right to attach the conveyance of their debtor. This obviates the necessity of obtaining judgment as a condition precedent to the demand by the trustee that a transfer of the debtor's property be set aside as fraudulent: *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229; *Blackman v. Baxter*, 125 Iowa, 118, 100 N. W. 75, 70 L. R. A. 250; *In re Pekin Plow Co.*, 112 Fed. 308, 50

C. C. A. 257; Chesapeake ¹¹³ Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261; In re Ducker, 134 Fed. 43, 67 C. C. A. 117.

But this does not obviate the necessity of the administrator, assignee or trustee in bankruptcy in such a case alleging and proving that claims of creditors have been filed and allowed as contemplated by law. He may question the bona fides of the transfer of the debtor's property in the interest of those creditors only to whom he may distribute the estate which shall come into his hands. That outstanding obligations exist is not enough. Unless these are established and allowed, as authorized by statute or the act of Congress, he has no authority to pay them from moneys that may come in his hands, to say nothing of the property the debtor has transferred to others. And, unless it appears that the representative of the creditors may appropriate the proceeds of property in the hands of third parties to the satisfaction of the debtor's obligations, setting aside transfers to them as fraudulent would be of no practical advantage. Section 57 of the bankruptcy act (30 Stats. 560, 561 [U. S. Comp. Stats. 1901, 3444]) provides for the proof, adjudication and allowance of the claims of creditors, and section 65 (30 Stats. 563, 564 [U. S. Comp. Stats. 1901, 3448]) directs the declaration of dividends "on all allowed claims." Where no claims are allowed, there are no dividends to be paid by the trustee, and therefore no occasion to interfere with property in the hands of third persons. To entitle the trustee to relief, the assets must appear insufficient to satisfy the claims of creditors: Deland v. Miller & Cheney Bank, 119 Iowa, 368, 93 N. W. 304. In the absence of any claims, the sufficiency of the assets is manifest.

Because of the omission to prove that any claims had been established against the estate, the decree of the district court must be, and is, reversed.

¹¹⁴ SUPPLEMENTAL OPINION.

PER CURIAM. The words "alleging and," found in the first sentence of the last division of the opinion heretofore filed, are ordered stricken therefrom, the point not being involved in the decision of this case; and with this modification the petition for rehearing is overruled.

DEEMER, J., Dissenting. I think the point is in the case, and that, if it is not necessary to allege the allowance of the claims by the referee in bankruptcy, it is not necessary to prove it. The creditors in the case have proceeded as far as they could, and the insolvency of the bankrupt is already established by the adjudication in the bankruptcy proceeding. In such cases the plaintiff need do no more than show the bankruptcy, the filing of claims, and the fraud in the conveyance attacked.

Clain, C. J., concurs in the dissent.

PRESUMPTION THAT A VOLUNTARY CONVEYANCE IS IN FRAUD OF CREDITORS.

I. In the Case of Existing Creditors, 556.

II. In the Case of Subsequent Creditors, 557.

I. In the Case of Existing Creditors.

There are authorities in effect holding that a voluntary conveyance is per se or conclusively fraudulent as to existing creditors of the grantor, irrespective of his intention or financial condition: See the note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 746; *Lehman v. Gunn*, 124 Ala. 213, 82 Am. St. Rep. 159, 27 South. 475, 51 L. R. A. 112; *Wooten v. Steel*, 109 Ala. 563, 55 Am. St. Rep. 947, 19 South. 972; *Wood v. Potts*, 140 Ala. 425, 37 South. 253; *Ramsey v. Nichols*, 73 Ill. App. 643; *Severs v. Dodson*, 53 N. J. Eq. 633, 51 Am. St. Rep. 641, 34 Atl. 7; *Hancock v. Elmer*, 61 N. J. Eq. 558, 49 Atl. 140, affirmed in 63 N. J. Eq. 802, 52 Atl. 1131.

The great majority of the courts, however, take a less extreme view. They hold that a voluntary conveyance is not conclusively fraudulent as against existing creditors, but that it is prima facie or presumptively fraudulent as to them, and that the burden is on those who seek to sustain it as a valid transfer to prove that the grantor has other property or means sufficient to pay his debts and discharge his obligations: *Driggs etc. Bank v. Norwood*, 50 Ark. 42, 7 Am. St. Rep. 78, 6 S. W. 323; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85, 19 S. W. 111; *McKeown v. Allen*, 37 Fla. 490, 20 South. 556; *Richardson v. Richardson*, 134 Iowa, 243, 111 N. W. 934; *Long v. Garey Inv. Co. (Iowa)*, 112 N. W. 550; *Standifer v. Baker*, 31 Ky. Law Rep. 42, 101 S. W. 365; *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Gray v. Chase*, 184 Mass. 444, 68 N. E. 676; *Matthews v. Thompson*, 186 Mass. 14, 104 Am. St. Rep. 550, 71 N. E. 93, 66 L. R. A. 421; *Golden v. Goode*, 76 Miss. 400, 24 South. 905; *Scharff v. McGaugh*, 205 Mo. 344, 103 S. W. 550; *American Nat. Bank v. Thornburrow*, 109 Mo. App. 639, 83 S. W. 771; *Baker v. Potts*, 76 N. Y. Supp. 406, 73 App. Div. 29; *Ricks v. Stancill*, 119 N. C. 99, 25 S. E.

721; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; Flynn v. Baisley, 35 Or. 268, 76 Am. St. Rep. 495, 57 Pac. 908, 45 L. R. A. 645; Carpenter v. Scales (Tenn. Ch.), 48 S. W. 249; notes to Jenkins v. Clement, 14 Am. Dec. 705; Hagerman v. Buchanan, 14 Am. St. Rep. 746.

Still another view seems to have been indulged by at least one court, which is that a voluntary conveyance is not even *prima facie* fraudulent as against creditors of the grantor: Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557. This rule, while it at one time prevailed in California, seems to have been corrected by the legislature: Gray v. Brunold, 140 Cal. 615, 74 Pac. 303; Hawley v. Harrington (Cal.), 92 Pac. 177.

II. In the Case of Subsequent Creditors.

The authorities are generally agreed that a voluntary conveyance is not presumed fraudulent as against subsequent creditors of the grantor. The burden is on them, when they assert that the conveyance is in fraud of their rights, to show actual fraud: Allen v. Caldwell (Ala.), 42 South. 855; O'Kane v. Vinnedge, 108 Ky. 34, 55 S. W. 711; Lander v. Ziehr, 150 Mo. 403, 73 Am. St. Rep. 456, 51 S. W. 742; Kinsey v. Feller, 64 N. J. Eq. 367, 51 Atl. 485; Gentry v. Lanneau, 54 S. O. 514, 71 Am. St. Rep. 814, 32 S. E. 523; notes to Jenkins v. Clement, 14 Am. Dec. 706; Hagerman v. Buchanan, 14 Am. St. Rep. 750.

PEDLEY v. FREEMEN.

[132 Iowa, 356, 109 N. W. 890.]

CONVEYANCE—Recovery of Payments by Vendee.—Where the vendor of land, because of the default of the vendee in his payments, rescinds the contract and resumes possession of the premises, in which the vendee acquiesces, the contract is abrogated completely, and the vendee may recover the money paid under it, regardless of false representations on the part of the vendor in making the sale. (p. 559.)

CONVEYANCE—Rescission—Inconsistent Remedies.—A petition by a vendee of land which sets forth the essence of a demand for a rescission of the contract of sale and asks for a recovery of the money paid and a cancellation of the notes given for deferred installments, and an amendment thereto which pleads a rescission by the vendor and asks judgment for a return of the advance payment, do not present inconsistent remedies between which an election may be required. (pp. 559, 560.)

J. J. Clark and C. H. Allen, for the appellant.

D. W. Hurn and Cliggett, Rule & Keeler, for the appellee.

³⁵⁷ WEAVER, J. It is shown without dispute that the parties entered into a written contract for the sale by defendant to plaintiff of a tract of land in Cerro Gordo county, Iowa. There was some snow on the land at the time, and plaintiff was not acquainted with the character or quality of the soil, except as he was able to note it under the then existing conditions. He paid one thousand dollars at or near the date of the contract, and went into possession, retaining it during the season of 1903. At or near the close of the year plaintiff refused to proceed further with his contract, and defendant, on March 1, 1904, served written notice on him that he (defendant) had elected to and did rescind the contract because of plaintiff's failure to pay the installment of purchase money due by the terms of the sale. Soon after the service of this notice defendant retook, and has ever since held, possession of the land: Plaintiff brings this action to recover back the payment made by him and to have the contract declared canceled, alleging as ground for such relief that he was induced to enter into said agreement by the false representations of defendant as to the character and quality of the land, and further says that defendant has retaken and is in possession of the property. These allegations are denied by the defendant, who further alleges ³⁵⁸ that plaintiff, by remaining in possession and use of the land during the season of 1903, waived his right to rescind. By cross-bill the defendant also seeks to recover the purchase price of the land, and foreclose his vendor's lien therefor. The trial court found for the plaintiff that the contract be declared rescinded, and decreed the cancellation thereof and of the notes given by plaintiff for the deferred payments. Judgment was also rendered in plaintiff's favor for the one thousand dollars paid by him, less an amount allowed to defendant for the use of the premises while in plaintiff's possession.

Arguments of counsel are devoted largely to the evidence as to the alleged false representations pleaded by the plaintiff. In the view we take of the record, the truth of these allegations is not necessarily a controlling factor in the case, and we shall not take the time to set out or discuss the testimony of the witnesses. We may say, however, that we think it fairly tends to show that the defendant did mislead the plaintiff as to the true condition and quality of the land, and that under the circumstances shown the plaintiff was

justified in relying upon, and did in fact rely upon, the representations so made to him. But, be this as it may, and whether good and sufficient cause did or did not exist for either party to rescind and abandon the contract, we are of the opinion that the trial court was clearly right in holding that it was in fact rescinded or abandoned by both, and that defendant is in no condition to now insist upon an enforcement of the agreement according to its terms. As we have already stated, the defendant resumed possession of the land and asserted his right thereto in a written declaration that he "elected to rescind and did rescind" the contract of sale. This is something more than a mere declaration of forfeiture by which a seller seeks to eliminate the rights of a delinquent purchaser and retain advance payments received. It is a rescission, and a rescission implies the entire abrogation of the contract and a restoration of the ³⁵⁹ benefits received from the other party. This is elementary, and requires no citation of authorities. It is unnecessary to consider whether defendant had legally sufficient grounds for rescission. He claimed the right and undertook to rescind, resumed the possession and control of the property, and plaintiff acquiesces therein and makes no claim of right or title to the land. In this condition of affairs there seems to be no room for controversy that the conclusion of the trial court was right. Such being the case, the points raised by counsel respecting the issues upon the cross-petition and the ruling of the court thereon need not be considered.

It is said on part of appellant that by the claims asserted in the plaintiff's petition he elected to confirm the sale, and cannot now insist upon its rescission; but, as we read the petition, it does not in any just sense of the word affirm or recognize the validity of the contract. While that pleading is not a model of clearness in expressing the pleader's idea of the remedy, and does not use the word "rescind," it does allege ground on which rescission could be enforced, and avoids the necessity of tendering a return of the land to the defendant's possession by alleging that defendant already has the possession. This is followed by a prayer for recovery of the money he had paid on the contract, and for the cancellation of the contract and of the notes given for the deferred installments of the purchase price. This is the essence of a demand for rescission. The amendment to the petition to which the defendant excepted does no more than

to plead the rescission made by the defendant, and upon the strength thereof asks judgment for a return of the advance payment. We think this does not make a case where the party seeks inconsistent remedies in the same action, and may be required upon motion of the other party to elect between them. Plaintiff had already pleaded a cause of action upon which he sought to recover back the advance payment made, and the amendment does no more than add another averment in ³⁶⁰ support of the same prayer for relief. This is also a sufficient answer to the further suggestion that the original petition is for equitable relief while the amendment pleads a demand for recovery at law. The conclusions above indicated render further discussion unnecessary.

We have examined the record and briefs with care, and find no reasons for disturbing the decree entered by the district court, and it is therefore affirmed.

On the Rescission of a Contract to Purchase Land the vendee is entitled to the purchase money if it has been paid: *Perry v. Boyd*, 126 Ala. 162, 85 Am. St. Rep. 17; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257.

BROOKS v. CONSERVATIVE LIFE INSURANCE CO.

[132 Iowa, 377, 106 N. W. 913.]

MUTUAL INSURANCE—Failure to Pay Dues.—A benefit certificate which provides that for a nonpayment of dues the member shall be suspended and his right forfeited, but which also provides for his reinstatement on specified conditions, does not contemplate that a failure to pay dues will ipso facto work a forfeiture without affirmative action by the association. (pp. 562, 563.)

Allen & Lingenfelter and George R. Sanderson, for the appellant.

W. P. Ferguson, for the appellee.

³⁷⁸ McCLAIN, C. J. In February, 1886, Sumner A. Brooks became a member of the Southwestern Mutual Benefit Association, and received a certificate of membership providing for the payment on his death of fifteen hundred dollars to his widow, the plaintiff in this action. The association was a mutual one, and the certificate provided for the

payment of assessments by the member, not exceeding twelve each year, and semi-annual dues, and that the member, failing to pay assessments and dues within thirty days after the date when due, "shall be suspended, and his certificate become null and void, and all rights and benefits, which may have accrued to the insured or his beneficiary, shall be forfeited to the association," and, further, that "a member who has been ³⁷⁹ suspended for nonpayment of his dues and assessments may be reinstated," on payment of back dues and furnishing a certificate of good health. The certificate also provided for printed or written notices to the member. Subsequently the Southwestern Mutual Benefit Association was consolidated with the Southwestern Mutual Life Association, but without any change or modification of the certificates of membership held by the members of the former association, and afterward, in 1900, the Southwestern Mutual Life Association undertook to reorganize under the stipulated premium plan, but being unable to comply with the requirements of law in that respect, it entered into a contract of reinsurance in February, 1901, with the defendant in this action, an old line insurance company, whereby the defendant company assumed and agreed to pay all claims for death losses on valid policies of the other company then outstanding, it being agreed that the defendant company assumed such liability, "subject to any and all liens, charges, and setoffs, and subject to all the stipulations, conditions, warranties, clauses, defenses and equities, which existed in favor of the Southwestern Mutual Life Association, and which would have or might have availed said (association) if this reinsurance had not been made and whether arising out of or based on the articles, by-laws, applications, policies, or contract of the said (association) or in any other manner." It is further stipulated that the defendant company "does hereby insure all the insurance of said first party (the Mutual Life Association), now in force or effect," etc.

In March, 1901, the defendant company issued to Sumner A. Brooks a certificate of reinsurance in which, after reciting the transfer and reinsurance of the business of the Southwestern Mutual Life Association, it is stipulated that the retention of such certificate of temporary reinsurance by the certificate-holder shall be construed to be an acceptance of the conditions contained in such reinsurance certificate and the obligation thereby assumed by the defendant company, ³⁸⁰ and unless another option is agreed upon it shall be construed to operate

as notice to said company that the certificate-holder named therein accepts the reinsurance provided for in said contract upon the reserve lien plan as provided for therein. It is also provided in the certificate of reinsurance that "the cash premium payment shall remain the same as that paid to the Southwestern Mutual Life Association, and shall be paid in the same manner as heretofore," and that "if no other option is chosen, as provided for in said contract of reinsurance, and the said certificate or policy becomes payable while this temporary insurance is in force, the said (defendant) does hereby agree to pay the same, provided that there shall be deducted from the face value of the certificate or policy hereby reinsured an amount equal to the amount of" certain loans or advances to the insured equal to the full reserve value of his policy, etc., "provided that this provision shall continue in force only until such time as a regular life policy of insurance in the (defendant) company is issued and delivered to the insured named herein."

Plaintiff founds her action on the original certificate in the Southwestern Mutual Benefit Association, and the temporary certificate of reinsurance above referred to, and alleges performance of the conditions of the contract of insurance except as to the payment of quarterly assessments and dues due September 1, 1902, and thereafter, up to the time of the death of Sumner A. Brooks, June 29, 1903, and alleges that such failure did not operate to work a forfeiture of the contract for various reasons which will be sufficiently discussed hereafter. The whole controversy in this case turns on the question whether at the time Sumner A. Brooks died the contract of insurance between him and the defendant company had been terminated by the conceded failure on his part to pay assessments or premiums and dues. Without considering all the propositions argued by counsel, we can satisfactorily dispose of the case by considering one³⁸¹ question involved without further recital of the elaborate provisions of the original certificate and the certificate of reinsurance, and without reciting at any great length the facts which were before the court by way of an agreed statement. We may concede that the provision in the original certificate for suspension of a member on account of nonpayment of assessments or dues became a part of the contract with the defendant company under its certificate of reinsurance, and that this contract continued in force up to the time of the

death of the insured, notwithstanding stipulations in the certificate of reinsurance for the issuance of a policy in the defendant company which would supersede the certificate of reinsurance, no such policy having been in fact issued. But the provision in the original certificate with reference to suspension for nonpayment which has already been quoted is not, as we think, self-executing, but implies that to effect such suspension and the consequent forfeiture of all rights and benefits under the certificate some affirmative action shall be taken by the association, and that only after proper action has been taken does the certificate become null and void. After suspension the member has the right to be reinstated on payment of back dues and assessments and the furnishing of a certificate of good health, and this provision evidently contemplates some act of suspension and notice thereof to the member after which his privilege to secure reinstatement may be exercised.

Under the general rules with reference to forfeitures and construction of the contract of insurance most strongly against the company, we have no hesitation in reaching the conclusion that the provisions above quoted as to suspension imply an affirmative act on the part of the association or the duly authorized officers thereof. Provisions very similar have frequently been thus construed: *Jelly v. Muscatine etc. Mut. Aid Soc.*, 120 Iowa, 689, 98 Am. St. Rep. 378, 95 N. W. 197; *Northwestern Traveling Men's Assn. v. Schauss*, 148 Ill. 304, 35 N. E. 747; *Warwick v. Supreme Conclave*, 107 Ga. 115, 32 S. E. 382 951. And see 2 Bacon on Benefit Societies, sec. 385. No doubt the failure to pay assessments may be made to operate ipso facto as a suspension; but taking all the provisions of this certificate together, they are not susceptible of that construction under the usual rules applied in such cases.

The defendant association did on the 1st of September mail a notice to the insured that a quarterly cash premium would be due September 30th, and this notice was received by insured in due course of mail, and in this notice the insured was advised that unless such premium be paid by or before the date named his policy would become forfeited and void. But there was no provision in the reinsurance certificate for a forfeiture on failure to pay a premium on the date when it became due, and the only provision on which defendant can rely as operating to work a forfeiture was

the provision quoted above from the original certificate in the Mutual Benefit Association. It is true that by the contract of reinsurance the insured became obligated to pay quarterly installments of premium instead of monthly assessments, but without a specified provision for forfeiture on account of nonpayment of such quarterly installments, the right of insured would not become forfeited without some action on the part of the defendant company: *Nederland Life Ins. Co. v. Meinert*, 127 Fed. 651, 62 C. C. A. 377; 2 *Joyce on Insurance*, sec. 1098.

The other grounds relied upon for appellee as avoiding any forfeiture which might otherwise have resulted from the nonpayment of the premiums by insured need not be considered. The appellant has wholly failed to make out any forfeiture, and is liable under its contract.

The judgment is affirmed.

For Authorities on the question decided in the principal case, see Jelly v. Muscatine etc. Mut. Aid Soc., 120 Iowa, 689, 98 Am. St. Rep. 378; Pacific Mutual Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862; Grand Lodge A. O. U. W. v. Marshall, 31 Ind. App. 534, 99 Am. St. Rep. 273; Pitts v. Hartford etc. Ins. Co., 66 Conn. 376, 50 Am. St. Rep. 96.

HINKLEY v. OIL AND PIPE LINE COMPANY.

[132 Iowa, 396, 107 N. W. 629.]

CORPORATIONS—Right of Promoters to Compensation.—Promoters of a corporation who render services in its organization with no view of compensation cannot enforce payment therefor against the corporation after it is organized. (p. 567.)

CORPORATIONS—Relation of Promoters to Subscribers.—Promoters of a corporation stand in a fiduciary relation to the company to be organized and those who subscribe for its stock, and are bound to act in good faith and to deal with them in perfect candor. (p. 569.)

CORPORATIONS.—A Subscriber to Stock has the Right to assume that others are paying the same price for stock that he is contracting to pay. (p. 570.)

CORPORATIONS.—The Directors of a Corporation are trustees for the stockholders, to whom they owe perfect fidelity in the discharge of their duties. (p. 570.)

CORPORATIONS.—The Issue of Stock Gratuitously is violative of the rights of other stockholders and creditors of the corporation, even though the directors believe that all the stock will attain par value. (p. 570.)

CORPORATIONS.—Directors Who Fail to Disclose to a Subscriber to stock that they are gratuitous holders of a majority of the shares are guilty of fraudulent concealment and liable for damages resulting therefrom. (p. 571.)

CORPORATIONS.—Representations to Subscribers that stock is nonassessable, which are merely expressive of an opinion, do not obviate the further misstatement that the stock is fully paid. (p. 572.)

CORPORATIONS—Recovery of Money Paid for Stock.—Representations by the directors to a subscriber of stock that promoters of the corporation paid for the stock held by them, when in fact they did not, entitles him to recover the sum he was thereby induced to pay for the certificate issued to him. (p. 573.)

CORPORATIONS—Parol Evidence of Fraud in Sale of Stock. The rule that parol representations are not admissible to vary the terms of a written agreement has no application to representations which amount to a fraud practiced in procuring subscriptions to corporate stock. (p. 573.)

CORPORATIONS—Rescission of Subscriptions to Stock After Insolvency.—A subscriber to stock may, notwithstanding the insolvency of the corporation, rescind his subscription on the ground of fraud, if he has been diligent in discovering the fraud and repudiating the transaction, unless proceedings in insolvency have been instituted or some act of insolvency committed. (p. 576.)

Will E. Johnston and J. B. McCrary, for the appellants.

W. A. Helsell, for the appellee.

³⁹⁷ LADD, J. Early in the year 1902 the defendant Petersmeyer and nine others met in Odebolt, Iowa, and there and ³⁹⁸ then concocted a scheme by which a company was to be organized to engage in some enterprise, the means of which should be obtained by the sale of stock therein to the public, and of that remaining enough should be issued to themselves gratuitously to give them the control of its affairs. In pursuance of this design each contributed a few dollars to a fund out of which the expenses were borne of one of them to investigate the prospects of zinc mining in Arkansas and of another to ascertain the situation with respect to the discovery of oil in Texas. The report of the latter proved the more enticing, and as a result the Sac Oil and Pipe Line Company was incorporated under the laws of Arizona, to be operated in Iowa, for the purpose of engaging in the oil business in Texas. The capital stock was divided into 499,999 shares, of the par value of \$1 each, and a few of these were issued to each of the promoters to enable them to elect eight of their number to serve as directors and officers of the company. Some days later the directors met and resolved to “accept from C. H. Smith, of Odebolt, Iowa (one of their

number), a certain contract made between R. L. Cox & Co., of Beaumont, Texas, under date of March 19, 1902, for the purchase of a certain block of land located in the Hogg-Swayne subdivision of blocks 36, 37, and 38, located on Spindle Top Heights, near Beaumont, Texas." This contract had been brought back by the representative who had gone to Texas. Neither he nor Smith had paid anything for it. While it purported to bind Smith, there is no dispute but that it was entered into with the intention of assigning it to some company to be formed, upon which by its terms he should be released, and it was not to be enforced against him. In other words it amounted to no more than an option prior to its assignment. As assignee the company assumed the obligation of paying the entire purchase price. By the terms of this contract Cox & Co. agreed to convey one sixty-fourth acre of land, the deed to be left with a bank at Beaumont, Texas, in escrow to be delivered upon the payment of the purchase ~~300~~ price of \$15,000. The company was to deposit \$2,000 with the same bank, to be paid to Cox & Co. upon the completion and acceptance of an oil-well of average producing capacity, six inches in diameter, piped and domed, all to be done within ninety days after such deposit. Cox & Co. also agreed to sell interests in their pipe-lines to the railway and that to be constructed to Port Arthur at prices stated therein, and to sell oil which would net \$4,500 or "the proportionate amount thereof" in part payment of the well; to loan oil to supply demands until the well should be completed which should be repaid therefrom. Upon acceptance of the well payments were to follow at short intervals. The contract named \$30,000 as the price, but the additional sum was inserted to enable the assignor to obtain a "margin" for his "services."

It was further resolved by the board of directors:

"That this corporation issue to C. H. Smith, in consideration of said contract, 499,989 shares of capital stock of this corporation on the condition that he surrender back to this corporation 250,989 shares, which may be used by the corporation to be sold at such price as the board of directors may so elect from time to time for the purpose of carrying out further promotions of this company; further, that 210,000 shares of the stock so issued to C. H. Smith be his stock, which he is allowed to allot to such parties as assisted him in the purchase of the above contract and on the condition

that the balance, 39,000 shares, be turned over to the company for the purpose of being sold by them at a less price than the treasury stock will be sold by the corporation. It is to be understood that the 39,000 shares being sold at a less price than the regular stock will be sold, is for the purpose of getting in some outside assistance if the company sees that it is absolutely necessary. And on the 1st day of August, 1902, whatever amount of the 39,000 shares is not sold or whatever part may be left of it, and still in the hands of the corporation shall revert back to the said C. H. Smith which he may divide among the said parties who assisted him in the purchase of the above said contract. On motion, a ~~400~~ block of 75,000 shares of the treasury stock of this corporation shall be placed upon the market to be sold at 25 cents per share subject to the call of the board of directors. On motion, the president and secretary were authorized to prepare suitable subscription blanks as they deem necessary for the business of the corporation."

The object of this manipulation was to render the stock paid up and nonassessable. It was issued as directed, and Smith transferred the two hundred and fifty thousand nine hundred and eighty-nine shares back to the company as treasury stock so called. By the men who assisted Smith was meant the other nine promoters of the company. All but about twenty-five thousand of the two hundred and ten thousand shares were distributed to the promoters gratuitously. While they may have advanced a little money and given some for the promotion of the company, no stock was issued in payment thereof. Nor were the advancements made or services rendered with a view to their return or compensation therefor by the corporation when organized. In these circumstances compensation by the company could not have been enforced: *Low v. Connecticut etc. R. Co.*, 45 N. H. 370; *Marchand v. Loan etc. Assn.*, 26 La. Ann. 389; *Perry v. Little Rock etc. R. Co.*, 44 Ark. 383; 10 Cyc. 264; *Thompson on Corporations*, sec. 486. See *Bell's Gap R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39. The portion of Petersmeyer was fifteen thousand one hundred shares. Fifty-six thousand nine hundred shares of treasury stock were disposed of at twenty-five cents a share. Much of this, if not all, was sold by the promoters acting for the company on applications similar to that signed by the plaintiff. It, with part of the printed matter, may be set out:

“Original: Money returned unless a gusher is brought in. J. W. Jackson, secretary, Lake City, Iowa. No. 70. I hereby subscribe for 1,000 shares of the capital stock of the Sac Oil & Pipe Line Co., at 25 cents a share, par value \$1.00 full paid and nonassessable. In payment therefor I ⁴⁰¹ remit \$—— or deposit \$250.00 in the Farmers’ National Bank of Odebolt to be held by said bank until a flowing oil well of 40,000 to 80,000 barrels capacity per day is brought in on the company’s property on Spindle Top Heights near Beaumont, Texas. Should no gusher be brought in within six months from date this money will be returned. Name: C. J. Hinkley. P. O. address: Odebolt, Iowa.

“Accepted June 5, 1902. Sac Oil & Pipe Line Company, J. W. Jackson.

“This order should be signed in duplicate. If you remit, one will be returned to you. If you deposit amount in your local bank, we return the duplicate to your bank to be held in trust. When accepted this is an agreement binding the company to deliver the shares or return the money. Stock will be advanced to 50 cents as soon as a gusher is brought in.”

In the fore part of June, 1902, satisfactory proof was received that oil had been struck, and that the capacity of the well was from forty to eighty thousand barrels per day, whereupon the plaintiff paid the amount of his subscription and received a certificate of one thousand shares. Prior to this, and on the sixth day of May, the company had contracted for another well at \$10,000, of which \$1,000 was to be paid when oil was reached, and the remaining \$9,000 out of the sale of oil to be obtained from the well. By the time proper connections were made and a vat procured oil ceased to flow from the top, and it was necessary to agitate with air, and later to employ a “steam head” and pumps. In this way oil to the value of between \$4,000 and \$5,000 was taken out. Then water came in, and the price of oil wells went down, so that one witness declared he now had them for sale at ten cents a piece. This somewhat extended statement of facts has seemed essential to a full understanding of the case. The petition is in three counts, in the first of which recovery of the amount paid by plaintiff for his stock is demanded on the ground that there was a conspiracy to defraud the public, the second because of the fraudulent representations and concealment ⁴⁰² of defendant Petersmeyer, and the third

owing to the nonpayment of stock by the promoters. The first two only need be considered.

2. The ten men who planned and organized the defendant company were promoters, within the meaning of the law: *The Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W. 773. A promoter is a person who brings about the incorporation and organization of a corporation. This was done by all of them, and with a specific design to defraud any of the public whom they might be able to induce to subscribe for stock. Those of them who were called as witnesses candidly admitted that the scheme adopted at the preliminary meeting was to engage in some enterprise, the costs of which and of its development should be paid solely from the proceeds derived from the sale of stock to others, should cost them nothing, and that enough stock should be issued to themselves so that in event of success they would manage and control the affairs of the corporation. In other words, the plan contemplated: 1. That in event of failure the entire loss would fall upon their neighbors; and 2. That in event of success they would appropriate to their own use without any consideration whatever more than one-half of the profits and property acquired. That this was a conspiracy to defraud the public is not open to doubt. As promoters these men stood in a fiduciary relation to the company to be organized, and those who should subscribe for its stock. As such they were bound to act in good faith and to deal with them in perfect candor. "The principle upon which courts of equity proceed in these cases is a very familiar one. The promoter of a company, like its directors, is deemed to sustain toward the members of the company the relation of a trustee toward his cestui que trust. This being so, he will not be permitted to speculate out of that relation, or to derive any secret advantages from it. He is bound to disclose to them fully all material facts touching his relation to them, including the ⁴⁰³ amount he is to get for his services as promoter": *Thompson on Corporations*, sec. 457; *The Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W. 773. These men deliberately planned to violate such trust. The cases are numerous where promoters have undertaken to sell property at an excessive price, and thereby obtain a secret profit. This is uniformly held to be a fraud on the corporation, and they are required to account for the difference. The method by which the corporation is

to be plundered can make little difference. It is the fact of doing so, by whatever method, that the law condemns.

In pursuance of the scheme these promoters elected eight of themselves, including Petersmeyer, directors, and in serving as directors all agree that everything was done in accordance with the plans originally made. The first act of the board was to undertake to so manipulate the stock that it could be said to be "fully paid." But Smith, as he was both promoter and director, might not acquire a secret advantage for himself or others lawfully. He merely transferred the contract, which had cost him nothing and was without value, and received the stock without consideration. Of this he distributed about one hundred and eighty-five thousand shares to himself and the other nine promoters gratuitously. They then proceeded to dispose of the treasury stock to whosoever could be induced to buy at twenty-five cents per share and a portion of the thirty-nine thousand shares at from six to ten cents a share. Those who bought had the right to assume, in the absence of knowledge to the contrary, that all other stockholders were paying the same price for stock issued as that they were contracting to pay: *Heliwell on Stock and Stockholders*, sec. 146.

This necessarily results from the relation of the directors who manage the corporation, and its stockholders for whom they are trustees and to whom they owe perfect fidelity in the discharge of their duties: *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *Marshall v. Farmers' & Mechanics' Sav. Bank*, ⁴⁰⁴ 85 Va. 676, 17 Am. St. Rep. 84, 8 S. E. 586, 2 L. R. A. 534; 10 Cyc. 787. In other words, subscribers to the stock of a corporation may act upon the supposition that those in charge of its affairs are dealing honestly with them. In discriminating between subscribers in the price of stock or in appropriating a part of it to their use, the directors do not deal fairly with them. "The stock of the corporation is supposed to stand in place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent to which it fails to represent such value it is either a deception or fraud upon the public, or an evidence that the original value of the corporate property has become depreciated": *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, 35 L. ed. 227.

The increase of the number of shares without a corresponding addition to the assets of the corporation necessarily depreciates the value of each share. The issue of stock gratuitously is therefore violative of the rights of existing, non-assessable stockholders, and in fraud of subsequent subscribers and creditors who deal with the corporation on the faith of its capital stock: Purdy's Beach on Private Corporations, sec. 290.

That the sale of stock to subscribers at any price after the promoters and directors had issued one hundred and eighty-five thousand shares to themselves gratuitously with the purpose indicated without disclosing the fact was a fraud on subsequent subscribers is manifest. Even if the directors believed, as is contended, that all the stock would attain par value in worth, this did not justify their scheme of appropriating the greater part of the profits to their own use. Nor does the fact that they guaranteed the company's notes relieve them. They proposed that the company should repay, and the guaranty was in no manner the payment of the 405 shares issued to them. Nor was any of the money expended for the company with this end in view. It is said that they mutually agreed to carry out the enterprise. Suppose they did: The contract with Cox & Co. was contingent, and neither individually nor collectively were they legally bound to fulfill the company's obligations. If they devoted their time or expended their money after oil had been found, this was for the company, and not in compensation for the stock. Moreover, all was done in furtherance of their original design to acquire the property through stock issued to themselves for nothing and to saddle the expense upon the members of the public who might be induced to subscribe for shares.

The fact of the issuance of the stock to the directors was not disclosed in the printed matter or prospectus of the company, nor by Petersmeyer, in inducing the plaintiff to subscribe. Had this been done, he would not have purchased the stock, and it is safe to say that no one else would have done so. The directors, including Petersmeyer, as intelligent men must have understood this, and in withholding facts so essential to any fair conception of the value of the stock in view of the design of the directors they were guilty of the fraudulent concealment and liable for damages resulting therefrom: Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915. The case is distinguishable from Pulsford v. Richards, 17

Beav. 97, for there it affirmatively appeared that the directors acted in good faith in allotting shares to themselves, and that the circumstances were such that had the facts been disclosed subscribers would not have been deterred from taking stock. The wrongs pointed out are precisely those the promoters designed at their first meeting. The organization of the corporation, the issuance, manipulation and sale of stock, involving breaches of duty both as promoters and directors, were in accordance with and steps in the execution of the scheme by these means to defraud those who might subscribe and pay for stock, out of a portion of the property to which ⁴⁰⁶ they should be entitled. A conspiracy is defined to be a combination of two or more persons to commit a criminal or unlawful act or a lawful act by criminal or unlawful means. Here a part of the means as well as the object was fraudulent, and each of the perpetrators is liable for damages suffered thereby: *Green v. Cochrane*, 43 Iowa, 544. And even though there were no conspiracy, the defendant Petersmeyer is liable for damages resulting from fraudulent concealment in the sale of the stock: *Young v. Gormely*, 119 Iowa, 546, 93 N. W. 565. True, there were no profits and the property acquired ceased to be of value. The persons promoting the enterprise suffered great loss in time and money. But neither of these facts can relieve them of liability for the wrongs perpetrated on others by fraudulently inducing them to part with their means.

3. In the second count of the petition it is alleged that Petersmeyer orally represented that the stock was paid up and nonassessable, and also that each of the promoters had put \$1,500 in the company. It may be the representation that the stock was nonassessable was merely expressive of an opinion that under the law the shares or certificate could not be taxed or assessed: *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203. This does not obviate the further misstatement that the stock was fully paid.

But plaintiff knew that he was buying treasury stock at one-fourth the par value, and although the representation of the company in its printed matter and of Petersmeyer with respect thereto, if any he made, was false, he could not have been deceived thereby: *Goff v. Hawkeye P. & W. Co.*, 62 Iowa, 691, 18 N. W. 307.

Petersmeyer denied that he told plaintiff each of the promoters had paid \$1,500 into the company's treasury. The

plaintiff testified that he did, and that but for such representation he would not have purchased the stock. The court might have accepted the latter statement as true, and ⁴⁰⁷ we are not inclined to disturb its finding. That a false representation of this kind is actionable cannot well be questioned. It amounted to an assertion that the promoters then in management of the company were financially interested by way of an investment of \$15,000, when in fact they had not deposited a cent in its treasury nor purchased a share of its stock. That, with knowledge of the facts, plaintiff would not have parted with money for stock, is too manifest for argument. Because of the deception he is entitled to recover the sum he was thereby induced to pay for the certificate issued to him: See *Coles v. Kennedy*, 81 Iowa, 360, 25 Am. St. Rep. 503, 46 N. W. 1088; *State Bank of Indiana v. Cook*, 125 Iowa, 111, 100 N. W. 72; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915.

4. Appellants contend that as the application for stock was reduced to writing, it is conclusively presumed to contain all the representations which induced the subscriber to make it. There is a syllabus in one case to this effect: *Smith v. Southern Bldg. & Loan Assn.*, 111 Ga. 811, 35 S. E. 707. But we are confident that, had the court undertaken to state its reasons for such a conclusion, a different result would have been reached. At any rate, the current of authority is that the general rule to the effect that parol representations are not admissible to vary the terms of a written agreement has no application to those representations which amount to a fraud on the part of the company, were made at the time of subscribing, and were the inducements by which the subscribers were obtained: *First Nat. Bank v. Hurford*, 29 Iowa, 579; *Davies v. Dumont*, 37 Iowa, 47; *Rives v. Montgomery Plank Road Co.*, 30 Ala. 92; *Martin v. Pensacola & G. Ry.*, 8 Fla. 370, 73 Am. Dec. 713; *Miller v. Wild Cat Gravel Road Co.*, 57 Ind. 241; *Kennebec & P. R. Co. v. Waters*, 34 Me. 369; *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Vreeland v. New Jersey Stone* ⁴⁰⁸ *Co.*, 29 N. J. Eq. 188; *Custar v. Titusville G. & W. Co.*, 63 Pa. 381; *Blodgett v. Morrill*, 20 Vt. 509; 10 Cyc. 422. This is for the very satisfactory reason that the parol evidence is not introduced to vary or contradict the written application or contract, but to show that none such was even properly made.

5. Appellants next enumerate a number of things that plaintiff knew before subscribing for the stock, such as the amount of the capital stock, that the only land owned by it was that previously mentioned, the contract described, that the value of the stock depended upon the production of oil, and that the subscription was not paid and the certificate stock was not issued until a "gusher" was produced. But there is no pretense that he knew the promoters had issued to themselves gratuitously one hundred and eighty-five thousand of the two hundred and eighty-eight thousand shares of stock issued, that the design of the promoters of the company was to shoulder all the expenses of the enterprise on the purchasers of the stock. No doubt they believed that "oil would be struck" and the value of stock would equal its par value, and thereby an investigation in the nature of a post mortem would not occur; but this furnished them no excuse for falsely concealing the fraudulent issuance of the bulk of the stock to themselves. Nor was there anything to put him on inquiry as to the truthfulness of the representation that each of the promoters had invested \$1,500. True, the plaintiff is a business man of experience. Shortly after subscribing for stock he with three others contracted for two oil-wells near those of the Sac Oil and Pipe Line Company's at a contingent cost of \$22,000. Later the syndicate entered into an arrangement with the company, each bearing half the expense, to procure oil from their wells by the use of compressed air, steam heads, and the like. The oil was turned into one tank and the proceeds of its sale divided. But all this emphasizes the fact of his confidence ⁴⁰⁹ in the promoters and directors of this company rather than to indicate that he was put on inquiry and should have detected the fraud practiced upon him.

6. It is further contended that plaintiff is estopped from demanding rescission by his laches. That this action was begun promptly upon the discovery of the cause alleged is not questioned, but counsel say that the fraud should have been discovered sooner. That with respect to the claims of subsequent creditors and subscribers for stock a shareholder "should act diligently to discover fraud" set up as a ground for rescission is doubtless true: *Cedar Rapids Ins. Co. v. Butler*, 83 Iowa, 124, 48 N. W. 1026. In such a case each stockholder is interested in the company, and is charged with knowledge which by diligence he might have ascertained,

and an action to rescind must be brought within a reasonable time after he has ascertained or should have learned of the perpetration of the fraud. This was the conclusion reached in the great case of *Oakes v. Turquard*, L. R. 2 H. L. 325, and it has been followed since: *Thompson on Corporations*, sec. 1323. Possibly, as between the subsequent stockholder or creditor and a shareholder seeking to have his stock canceled, the latter would be required to examine the books and to avail himself of such information as these might afford. But the relation of the shareholder to the company which has procured his subscription through its agents by fraud is somewhat different. He stands the same as though the fraud had been perpetrated by some individual. He is not required to suspect the promoters and directors of disregarding their obligation to those whom it was their duty to protect. Where all seems fair, he is not bound to inquire as though the contrary were true. Of course, where the means of knowledge are at hand, and by ordinary diligence he should have ascertained the facts constituting the fraud, he will be charged with such knowledge. For the means of knowledge are equivalent to knowledge, and a clue which, if followed up with ordinary diligence, would lead to a discovery, in law⁴¹⁰ is equivalent to a discovery—equivalent to knowledge: *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa, 737, 98 N. W. 606. The evidence shows that the plaintiff was lulled into security, and did not suspect, nor have any reasons to suspect, the fraud practiced upon him until a few days before beginning the action. This was suggested by ascertaining that some of the stock had been sold at from six to ten cents per share, and upon consultation with his attorney he was advised to examine the books of the company. These disclosed the failure to invest the money as claimed and the issuance of the stock to the promoters. We are of the opinion that he was not dilatory in discovering the fraud, and should not be estopped from maintaining the action against the very parties who perpetrated the wrong.

It appears, however, that the company was insolvent at that time, and it is suggested that for this reason the stock ought not to be canceled. The accepted doctrine in England is that a subscription for stock cannot be rescinded where suit is instituted subsequent to the insolvency of the company and when its affairs are being wound up: *Stone v. City*

and County Bank, 3 C. P. 28; Oakes v. Turquard, L. R. 2 H. L. 325; Henderson v. Royal British Bank, 7 El. & B. 356, 363. It is said that no person who, at the commencement of the winding up, is de facto a member—that is, who has, by a contract not previously avoided, become a member—can withdraw from the distribution for the benefit of creditors any part of the company's assets, either by recalling money paid by him to the company or by taking himself out of the category of those liable to pay further calls. In consequence of the distribution of assets amongst creditors, a member cannot insist upon the equity which he might otherwise have claimed to be relieved from his contract with the company: 2 Thompson on Corporations, sec. 1441. But it seems that proceedings in insolvency of some nature must have ⁴¹¹ been begun, or at least resolved upon, or that payment has been stopped by the company by reason of its insolvency: 10 Cyc. 439.

Substantially the same doctrine prevails in this country, the difference being due to the fact that there is no public registration of shareholders here such as is required in England. In Martin v. South Salem Land Co., 94 Va. 28. 26 S. E. 591, it was held that the shareholder cannot rescind his subscription on the ground of fraud as against bona fide creditors after the corporation has stopped payment and become actually insolvent, unless he has been diligent in discovering and repudiating the fraud. But if he has been diligent in both these respects, the insolvency of the company alone will not defeat his right to rescission: Beal v. Dillon, 5 Kan. App. 27, 47 Pac. 317; Newton Nat. Bank v. Newbegin, 74 Fed. 135, 33 L. R. A. 727, 20 C. C. A. 339. The true rule, as it seems to us, is stated in Fear v. Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721; and that is, the right to rescind may be exercised, assuming diligence, unless proceedings of insolvency, voluntary or involuntary, have been instituted or some act has been committed which is regarded as an act of insolvency. Not until then does the entire property of the corporation, including unpaid subscriptions to its capital stock, become a trust fund for the payment of its debts, and not until then are the creditors entitled to the payment of their debts before there can be any distribution among the stockholders. "So long as the company is a going concern, having the possession and management of its property,

contracts made by and with the company are governed by the same principles of law as a contract between individuals; and such being the case, if one is induced to become a subscriber to its capital stock by the fraud of the company, and within a reasonable time after the discovery of the fraud, there being no laches on his part in discovering the fraud, repudiates his subscription, and this, too, before the insolvency ⁴¹² of the company, under such circumstances he is, according to the settled law of this country, relieved of all liability on account of his subscription. He is relieved because he has the right to avoid a fraudulent contract, and because he has exercised this right. The subsequent insolvency of the company can, upon no principle, make him liable on a fraudulent contract which he has thus repudiated; and under such circumstances we cannot agree that the equities of the creditor are superior to the defrauded shareholder." The plaintiff subscribed for stock June 5, 1902, and this action was begun in February, 1904. The incorporation was proven to be insolvent when the action was begun; but how long it had been so was not shown. Nor does it appear that any proceedings in insolvency had been commenced, or that it had committed any act of insolvency. In these circumstances it cannot be said that the court erred in canceling the shares of stock issued to the plaintiff.

The decree is affirmed.

In the Case of Cuba Colony Co. v. Kirby, 149 Mich. 453, 112 N. W. 1123, it appeared that promoters of a corporation represented that they held a contract to purchase certain lands for sixty thousand dollars, on which they had paid twenty thousand dollars, and they proposed to transfer it to the corporation for twenty thousand dollars in stock if it would pay the remaining forty thousand dollars on the contract. The proposal was accepted, and the corporation organized with a capital of sixty thousand dollars, of which forty thousand dollars were paid for the land and twenty thousand dollars in stock to the promoters. The price of the land was, in fact, forty thousand dollars, and the promoters had paid nothing thereon. It was held that they were not entitled to retain their stock and were accountable to the corporation for moneys received from its sale, and that the fact that some of the associates doubted the truth of the promoters' statements was immaterial, where they were finally led by the promoters to resolve that doubt in their favor and to act upon the assumption that the fraudulent statements were true. It was also held that the maxim requiring a complainant in equity to come with

clean hands was not applicable, on the ground that after its acquisition of the land, the complainant corporation issued statements misrepresenting its value, since without the promoters, who were chiefly responsible for the false statements of the corporation, it will not be presumed that such statements will continue to be issued, or that further harm will come therefrom. The promoters were denied an allowance for their promotion expenses, on the ground that they represented to their associates that there was to be no such allowance. The court also held that where the stock was so fraudulently obtained by a promoter and had been transferred to the holder in good faith as security for a debt, such holder had the right to retain it as such security, subject to the right of the corporation to pay the debt and to be subrogated to such holder's right as against his debtor.

Promoters of a Corporation sustain toward it and the shareholders a fiduciary relation, and are governed in their dealings by the rules ordinarily applicable to persons standing in such relation: *Old Dominion Copper etc. Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, and cases cited in the cross-reference note thereto. As to their right to compensation for their services, see *Pietsch v. Milbrath*, 123 Wis. 647, 107 Am. St. Rep. 1017; *Scott v. Farmers' etc. Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835; *Taussig v. St. Louis etc. R. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674.

Subscriptions to Stock procured through the fraudulent representations of promoters or agents of the corporation may be rescinded by the subscribers: *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249; *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939; *Howard v. Turner*, 155 Pa. 349, 35 Am. St. Rep. 883.

SPILDE v. JOHNSON.

[132 Iowa, 484, 109 N. W. 1023.]

LIMITATIONS—Revival of Judgment by New Promise.—A judgment is, without regard to the cause of action on which it is founded, a debt *ex contractu* which, when barred by the statute of limitations, may be revived by a new promise. (p. 580.)

E. W. Cutting, for the appellant.

E. P. Johnson, for the appellee.

484 WEAVER, J. Prior to the year 1878 the plaintiff herein purchased certain land from Johanna Johnson, from whom he took a conveyance. Thereafter other persons, who claimed to have been tenants in common of said land with said Johanna Johnson, appeared and demanded partition thereof. This claim was established by a proper proceeding

in district court. In entering the decree in that proceeding it was found, among other things, that Johanna Johnson was indebted to the claimants in the sum of one hundred and forty dollars and fifty-two cents, and that Spilde was indebted in an equal or greater amount to Johanna Johnson, and this matter was adjusted by entering a judgment against said Spilde for the sum above named in favor of said claimants, John Anderson and Stephen Anderson. This judgment remaining unpaid, the Andersons, on June 8, 1881, assigned it to E. J. Johnson, who, on July 12, 1904, assigned it to Perry S. Johnson, the defendant herein. ⁴⁸⁵ On the date last mentioned Spilde and wife united in a mortgage on the land in question to Perry S. Johnson to secure the payment of the judgment. After describing the record of the judgment thus to be secured, said mortgage contains the following clause: "For value received, time is given on this judgment for three years, and we hereby promise and agree to pay the said judgment, with interest as therein expressed, on or before July 12, 1907, and said John P. Spilde is to get credit on this judgment for forty-four dollars and eighty-eight cents. The balance of said judgment we agree to pay, with cost and interest." On August 19, 1904, this action was begun in equity to annul, cancel and discharge said mortgage, on the ground that the judgment, and the original right of action or claim on which it was based, had at the date of said mortgage been long barred by the statute of limitations, and that said judgment is not a contract obligation, and is therefore not subject to be revived, or to have its actionable quality restored, by a subsequent acknowledgment of its nonpayment or by a subsequent promise to pay. In answer to this petition, the defendant pleaded the facts above stated as to the origin of the judgment and his ownership thereof, and the fact that it had never been paid, as well as the subsequent written promise by plaintiff to pay the same, as set forth in said mortgage. On these pleadings the cause was submitted to the court, and decree thereafter entered dismissing plaintiff's bill as being without equity.

It will be observed that at the date of the mortgage the judgment had been barred by the statute of limitations, and the one question presented is whether the written acknowledgment of the debt and promise to pay contained in the mortgage operates to waive the defense of the statute and revive

said judgment. It is to be admitted that cases may be found which class judgments, not as contracts, but as obligations in invitum, and therefore not subject to be revived, as against the statute of limitations by a new promise to pay, because the statute providing for a renewal or revivor by a new ⁴⁸⁶ promise to pay is confined to actions ex contractu: Code, sec. 3456. Such is the holding in *Berkson v. Cox*, 73 Miss. 339, 55 Am. St. Rep. 539, 18 South. 934. But this court is committed to another view of the law. As early as the case of *Johnson v. Butler*, 2 Iowa, 535, we held that the obligation of the judgment defendant is a debt, and that an action brought upon a judgment is ex contractu, without regard to the nature of the original cause of action on which the judgment was recovered. This doctrine has the support of the weight of authority: *Carr v. Rischer*, 119 N. Y. 117, 23 N. E. 296; *Nazro v. McCalmont Oil Co.*, 36 Hun, 296; *Taylor v. Root*, 4 Keyes (N. Y.), 335; *Gutta Percha Co. v. Houston*, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402, 8 Cyc. 831; *Osborne & Co. v. Heuer*, 62 Minn. 507, 64 N. W. 1151; *Parsons on Contracts*, 7; *Chitty on Contracts*, 2; *Story on Contracts*, 2; *First Nat. Bank v. Van Voris*, 6 S. Dak. 548, 62 N. W. 378; *White v. Moore*, 100 Ky. 358, 38 S. W. 505. In a suit upon a judgment this court applied the same rule, and held the right of action was revived by a new promise, although it is to be said that the point now under discussion does not seem to have been considered: *Frisbee v. Seaman*, 49 Iowa, 95. It is to be remembered that a statute of limitations is a statute of repose. It simply takes away the right to maintain an action, but it does not pay or cancel the debt. The debt still exists, and, though action is barred, the fact that it exists affords sufficient consideration to support a new promise to pay, and when said promise is in writing the statute gives it legal effect in the revival of the right to sue thereon.

Holding, as we do, that for the purposes of the statute the judgment debt must be treated as a claim ex contractu, it follows of necessity that the appeal in this case cannot be sustained; and the judgment of the district court must be, and it is, affirmed.

The Decision in the Principal Case seems opposed to *Olson v. Dahl*, 99 Minn. 433, 116 Am. St. Rep. 435; *Berkson v. Cox*, 73 Miss. 339, 55 Am. St. Rep. 539; *McCaskill v. McKinnon*, 121 N. C. 192, 62 Am. St. Rep. 659.

SMITH v. SMITH.

[132 Iowa, 700, 109 N. W. 194.]

APPEAL—Filing of Transcript—Trial De Novo.—To authorize the appellate court to consider a case de novo, the statute, as it stood when this appeal was taken, required the certified transcript of the evidence to be made and filed within six months from the date of the judgment appealed from. (p. 583.)

APPEAL—Preparation of Transcript.—If a Party Postpones or neglects to take his appeal and to order his transcript until so near the expiration of the period allowed by law that it is physically impossible to complete the record in time, he does so at his peril, and the trial court may rightfully decline to enter an order which it knows the reporter, in the exercise of reasonable diligence, cannot comply with. (p. 584.)

RESULTING TRUST—Purchase by Husband with Wife's Funds.—Where a man purchased land with his wife's money, took the title in his own name, and assured her that he had arranged his affairs to protect her, she may assert her rights in the property after his death. He was in effect her trustee, and the statute of limitations will not commence to run until there has been a repudiation of the trust, nor does it come within the statute requiring all express trusts to be proved by writing. (p. 584.)

ESTATE OF DECEDENT—Accounting for Rents.—A widow in possession of an estate pending administration should account for the rents in the probate proceedings, not in a suit for partition. (p. 584.)

PARTITION—Unsettled Estate of Decedent.—The fact that an estate of a decedent is not fully settled is no defense to an action of partition. (p. 585.)

PARTITION—Counsel Fees may be Taxed in partition proceedings when there is no dispute as to the ownership of the property and the respective shares to which the parties are entitled, although other matters are litigated. (p. 585.)

John L. Benhow, for the appellants.

Herminghausen & Herminghausen, for the appellee.

⁷⁰¹ **WEAVER, J.** Daniel D. Smith died intestate January 5, 1902, seised of certain real estate in Lee county, Iowa. He left surviving him a widow, who is the plaintiff in this case. He was childless and his only heirs are certain collateral relatives, who are made defendants in the proceeding. The petition shows these facts and avers that Smith died seised of a certain one hundred and twenty acre tract of land in said county, of which the widow asks to be adjudged the owner of an individual one-half, and that partition be adjudged accordingly. The action was begun within one year after the death of Smith, but the petition avers that his estate is solvent, and

there will be no occasion to resort to the land for the payment of claims. Upon motion of the defendants, plaintiff amended her petition to include a statement of the rents and income received by her from the land in question and disbursements made by her on account thereof. She further avers that her husband in his lifetime, having in his possession moneys and credits belonging to her, used the same without her consent and over her protest to build a barn and make other improvements on said land, assuring her that he had so arranged his affairs that the land would become hers in the event of his death and upon this showing she asks that she be decreed to have an equitable interest in, or lien upon, said land for the moneys so appropriated by her husband to the amount of nine hundred dollars.

702 The defendants answered in denial, and thereafter, by way of cross-petition, allege that, in addition to the land already mentioned, Daniel D. Smith died seised of a certain lot in Fort Madison, Iowa, of which they demand partition, and an accounting of rents and profits.

Answering the cross-petition the plaintiff alleges that the lot in question was purchased with her money and the title thereto taken in the name of her husband without her knowledge or consent. She further alleges that when she learned that her husband had taken the title to himself he explained that it would make no difference, as he had so arranged his affairs that all the property should be hers at his death and that proper papers had been executed to secure this result and upon these averments she asks that the title be adjudged to have been held by her husband in trust for her benefit, and the title be now quieted in her. In reply to this answer the defendants aver that, plaintiff having failed to move in the matter in the lifetime of her husband, she is estopped from now insisting upon her alleged title.

Upon trial to the court a decree was entered adjudging the plaintiff to be the owner of an undivided one-half of the one hundred and twenty acres of land, and dismissing her claim for a lien on said land on account of improvements thereon alleged to have been made with her money. As to the lot in Fort Madison, the court found for the plaintiff that she was the equitable owner thereof and quieted her title thereto. By a supplemental decree the prayer of the defendants for an accounting by the plaintiff was denied, because such accounting had already been made by said plaintiff in her report to the

court as administratrix of her husband's estate. The costs made on the cross-petition were taxed to the defendants. The decree of partition was entered November 12, 1904, and, on April 27, 1905, defendants applied to the district court for an order requiring the shorthand reporter to make a complete transcript of the record and evidence, and file the same duly ⁷⁰³certified on or before May 11, 1905. This application was resisted by the reporter, who made showing that, by reason of the shortness of the time and prior official engagements which he could not properly postpone, it was not possible for him to furnish the transcript as demanded. The application was denied, and error is assigned upon the ruling. On May 9, 1905, notices of appeal by both plaintiff and defendants were duly served. On July 14, 1905, an order was entered directing the referees to pay the costs incurred in the partition proceedings including fees to plaintiff's counsel and to the referee, to retain in his hands subject to the further order of the court the sum of eleven hundred dollars and to distribute the remainder to the parties pro rata according to their several interests in the property. From this order defendants have also appealed.

1. To authorize the court to consider the case de novo, our statute, as it stood at the time this appeal was taken, required the certified transcript of the evidence to be made and filed within six months from the date of the judgment or decree from which the appeal was taken. This has been so often upheld that we need not stop to cite the numerous authorities. There is no such certification in the case before us, and we must assume that the decree has sufficient support in the testimony.

Nor was there any error under the circumstances in the refusal of the trial court to order the reporter to make and file the transcript in the short time demanded by appellants. It is true that the statute provides for the certification of the record by the judge and reporter "when demanded by either party," but it certainly cannot be rightfully demanded until the transcript has been made, and the transcript certainly cannot be furnished instantaneously upon a party's application. The law allows six months in which an appeal can be taken, thus affording ample opportunity for parties and counsel to procure and file ⁷⁰⁴all necessary transcripts. If a party postpones or neglects to take his appeal and to order his transcript until so near the expiration of the period that it is physically impossible to complete the

record in time, he does so at his peril, and the trial court may rightfully decline to enter any order which it knows that the reporter, in the exercise of reasonable diligence, cannot comply with. Such appears to have been the situation here. The time for the appeal from the decree was to expire May 11, 1905. The defendants did not appeal until May 9, 1905, and their application for an order for transcript was not made until April 27, 1905. The reporter was busy with other transcripts requiring his time and attention. The demand of appellants that he should at once produce their transcript was unreasonable and was properly denied. In this discussion we do not attempt to construe or determine the effect of the amendment to the statute found in chapter 155, Laws Thirty-first General Assembly, which was enacted after the time for appeal in the instant case had expired.

2. We have, however, examined the evidence as submitted in the abstracts, and are satisfied that the trial court reached a correct conclusion. It clearly appears that the purchase of the lot in Fort Madison was made with plaintiff's money and under circumstances supporting her claim to its equitable ownership. It would be unprofitable to spend time in discussing the evidence, but we have to say that, after giving due consideration to all the testimony of all the witnesses and discarding all the admissibility of which is involved in any doubt, we think the plaintiff entitled to the relief granted her. Neither do we find any laches on plaintiff's part which will estop her from claiming her rights in the premises. The deceased quieted her complaints by the assurance that he had arranged his affairs to protect her, and he doubtless intended to do so. He was in effect her trustee, and the statute of limitations will not run against the trust until there ⁷⁰⁵ has been some denial or repudiation of it by the trustee. Nor does it come within the contemplation of the statute requiring all express trusts to be proved by writing.

3. There was no error in the ruling of the court which relegated the matter of accounting for rents to the settlement of the accounts of the plaintiff as administrator. In that capacity, in the absence of other heirs, she had the right to take possession of the land and receive the rents thereof, and the probate court was the proper place for her to account: Code, sec. 3333. Whether, as widow in possession pending the assignment of dower, or as tenant in common with the heirs, she is chargeable with liability to make such an accounting, we need not here determine.

4. The fact that the estate of the ancestor had not been fully settled is no defense to the action of partition. No authority is cited to the effect that action of partition will not lie until the estate of the ancestor is fully settled. In *Minear v. Hogg*, 94 Iowa, 641, 63 N. W. 444, it is suggested that during the first year of administration partition "cannot safely be made." It was, however, there distinctly decided that the action need not wait until the estate was finally settled, and if the suggestion that partition cannot safely be made during the first year be not obiter it at least goes no further than to suggest that determination of a suit for partition may well be postponed until there is some satisfactory showing that the land will not be required for the payment of claims. In the present case the decree for partition was not entered until nearly three years after the death of the ancestor, and there is no pretense that there was at the time any occasion to delay the decree for the purpose of settling the estate. The case of *Thomas v. Thomas*, 73 Iowa, 657, 35 N. W. 693, to which we are cited, holds simply that the widow cannot be compelled to elect between dower and homestead rights until the claims have been filed and the real condition of the estate is ascertained.

708 The appellant's objections to the allowance of attorney's fees are not well taken. We have held that where there is a dispute as to the ownership of the subject and both parties are represented by counsel, attorney's fees will not be taxed: *McClain v. McClain*, 52 Iowa, 272, 3 N. W. 60; *Duncan v. Duncan*, 63 Iowa, 150, 18 N. W. 858; *Everett v. Croskrey*, 101 Iowa, 17, 69 N. W. 1125. In the instant case, so far as the land which plaintiff sought to have partitioned is concerned, there was and is not the slightest controversy concerning its ownership or the respective share to which the parties are entitled. Appellants appeared therein, not to contest the title as alleged by the appellee, but to introduce and litigate another claim. It follows, we think, that, as to the partition of this tract, there was no error in assessing the fees provided by statute.

Appellants also complain of the taxation of the costs and of other rulings in the course of the proceedings, but, without attempting to consider them seriatim, we may say that we have examined the record as to each point made and think none of them can be sustained.

5. Concerning the plaintiff's appeal it need only be said that the issue discussed turns solely upon questions of fact on which plaintiff had the burden of proof, and we concur with the conclusion of the trial court that sufficient showing was not made to entitle her to the special lien demanded.

The decree is, therefore, upon both appeals, affirmed.

A Trust Results, except in those states where the rule has been abrogated by statute, when one person pays money for land, but the conveyance is taken to another: See *Hanrion v. Hanrion*, 73 Kan. 25, 117 Am. St. Rep. 453; *Leary v. Corvin*, 181 N. Y. 222, 106 Am. St. Rep. 542.

The Creation of Trusts in land by parol is the subject of a note to *Insurance Co. v. Waller*, 115 Am. St. Rep. 774.

PARTITION INVOLVING THE PROPERTY OF DECEDENTS WHOSE ESTATES HAVE NOT BEEN SETTLED OR DIS- TRIBUTED.

- I. The General Rule, 586.
- II. Statutes Withholding the Right Until the Settlement of the Estate, 590.
- III. Giving Time to Settle the Estate, 591.
- IV. Discretion of the Court to Prevent Injustice in the Application of the General Rule, 592.
- V. Where Part Only of the Estate has been Acquired by Devise or Descent, 593.

I. The General Rule.

Both at the common law and under the various American statutes controlling the descent and distribution of real property and the settlement of estates of deceased persons, such property, on the death of the owner, instantaneously vests in his heirs or devisees, and if by such vesting any of them becomes the owner of an undivided interest in any portion thereof, he falls within the express language of the statutes declaring who are persons entitled to partition, and his interest is clearly within the designation of the estates of which partition can be had. Some, and perhaps a majority, of the states have by statute widely departed from the common law in respect to the settlement and distribution of estates and the methods of declaring who have succeeded to the interests of the decedents. At the common law, the title of an heir or devisee was established wherever it became material by evidence competent and sufficient to show the decease of the former owner and the descent of the property to his heirs at law, or that he died testate, and if so, to whom the property passed by devise. The rights of creditors of the estate could be enforced only by suits in chancery (*Pomeroy's Equity Jurisprudence*, secs. 156, 346, 1152-1154), and the heirs or devisees, if it became necessary to assert their claims, resorted to actions at

law. Under the American statutes, executors and administrators are, in some of the states, given the right to the possession and the rents of real property during the administration, at least, when necessary for the purposes of such administration or for the payment of debts of the decedent, and the persons who have succeeded to the property, whether by descent or devise, must be ascertained and declared, and their respective interests stated by the final decree of distribution of the probate or surrogate court having jurisdiction of the estate of the decedent. Hence, it may happen that the court in which the suit for the partition of the property is brought may, equally with the court in which the settlement of his estate is sought, be called to determine whether he died testate or intestate, and in the one case who are his devisees, and in the other who are his heirs, and in either case what are the respective moieties of each. Furthermore, in several of the states, the court having jurisdiction of the estates of decedents may, after ascertaining in whom they have vested either by devise or descent, proceed to partition them and to assign to each heir or devisee in severalty an interest corresponding to his share in the estate. Hence, the question must often arise whether these different courts, exercising independent jurisdiction, may both proceed at the same time, and particularly, whether a court of equity or of law ordinarily exercising jurisdiction over the subject of partition may proceed to consider and determine the title when it is based on descent or devise, and the question of who is entitled to it has not yet been determined by the court having jurisdiction of the estate of the decedent by devise or descent from whom it is claimed an interest has been acquired. Furthermore, though there may be no doubt of the devise or descent, the estate may still be subject to the claims of the creditors for the enforcement of which the probate, surrogate, or like courts may have plenary authority, in the exercise of which, by orders of sale, the title may be transferred to a purchaser having and acquiring no interest either as heir or devisee. These considerations, in our judgment, should have been held to work an implied temporary withdrawal from the courts of general jurisdiction over the subject of partition the authority to exercise the jurisdiction when, if exercised, it must conflict with jurisdiction granted by valid laws on courts of probate and other courts of similar jurisdiction. Such, it must be confessed, is not the conclusion reached by a great majority of the courts considering and determining the question: *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806; *Watke v. Stine*, 214 Ill. 563, 73 N. E. 793; *Smith v. Smith*, 132 Iowa, 700, ante, p. 581, 109 N. W. 194; *Raynsford v. Holman*, 68 Kan. 813, 74 Pac. 1128; *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A., N. S., 354; *Wise v. Wolfe*, 27 Ky. Law Rep. 610, 85 S. W. 1191; *Longley v. Longley*, 92 Me. 395, 42 Atl. 798; *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371, 60 N. E. 493; *Vampau v. Campau*, 19 Mich. 116; *Garrett v. Colvin*, 77 Miss.

408, 26 South. 963; *Chrisman v. Divinia*, 141 Mo. 122, 41 S. W. 920; *Robertson v. Brown*, 187 Mo. 452, 106 Am. St. Rep. 485, 86 S. W. 187; *Kelly v. Kelly*, 41 N. H. 501; *Simpson v. Straughan* (N. J.), 19 Atl. 667; *Hayden v. Sugden*, 48 Misc. Rep. 108, 96 N. Y. Supp. 681; *Reubel v. Reubel*, 47 Misc. Rep. 474, 95 N. Y. Supp. 966; *Reifsnyder's Estate*, 214 Pa. 637, 63 Atl. 1075; *Hinman v. Hinman*, 126 Wis. 191, 105 N. W. 788.

Thus, in *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806, the court said: "The parties in interest are adults. The right to partition is fixed by statute, and where the rights of infants or minors are not involved, the court may not refuse to declare the rights of the parties claiming to be owners of the land, and decree partition among them according to their rights. The appellant denies and contests the right and claim of the appellee to heirship. He urges her illegitimate birth, and denies that she had been legitimated within the requirements of our law. She was not shown on the files of the estate as an heir, and it was proper that she should speedily bring and prosecute her suit, which would fix her rights. While the practice is not approved or commended of making actual partition or sale under such proceeding prior to the settlement of estates, we are not prepared to hold, under our statute, that a decree for either is reversible error. The creditor cannot be injured thereby, for if actual partition is had, the lands are still subject to sale, and if a sale in partition is had, the purchaser likewise takes subject to the charge of the debts of the ancestor, and the rule of caveat emptor applies. If the owners of these lands could agree and should make partition among themselves, no one would question that it would be a good and valid partition, non constat the estate of the ancestor is unsettled. The statute points out when partition may be had, and the contents of the bill or petition, so far as the legislature deemed the same essential, are prescribed. Section 1 of chapter 106 expressly confers the right upon those who have derived their title by descent. They can only act where the ancestor dies intestate and the title passes by operation of law. If it had been the legislative intent that the right should only be exercised by those who derive title by descent after the period allowed by law for the filing of claims against the estate of the ancestor, that intention would have been manifested in some manner or by some language contained in the statute. Nothing of the kind appears, and we can find no warrant for the court reading into the statute additional requirements. Many of the states have by statute prohibited the institution of a proceeding for partition before the expiration of the time within which the estate of the decedent should be settled. Not so in this state. Appellant and an appellee are the owners of the land charged with the payment of the debts of the ancestor and the widow's rights. As owners they are entitled to the beneficial use of it. If one shall chance to be in exclusive possession at the death of the ancestor and

deny the right of the other, it would seem a harsh rule, in the absence of some positive requirement of law, to say his right should be postponed until the settlement of the estate."

So, considering the question whether an heir seeking partition must show that the property was not liable to be taken for the ancestor's debts, the court said: "Immediately upon the death of the ancestor, title to his real estate descends to his heirs, subject only to appropriation for the payment of debts. They are entitled to possession, and may require partition at once. Letters of administration may not be taken out for a long period of time, or not at all. Much time may elapse before claims are presented or established, or before it may be known that the personal assets are insufficient. During such periods they are entitled to the separate enjoyment of their several portions of the estate, and may proceed to enforce their rights unless some special state of facts should make it unjust or improper that they should do so. General creditors are not proper parties to partition proceedings at all, and the administrator should not be joined unless under exceptional circumstances. If, after partition, the administrator should require the land, or some portion of it, for the payment of debts, it may then be sold. Therefore, it was not necessary that the heirs, as a condition of recovery, should either plead or prove that the decedent's estate had been settled, or that no debts existed for the payment of which the land might afterward be appropriated": *O'Keefe v. Behrens*, 73 Kan. 469, 88 Pac. 555, 8 L. R. A., N. S., 354.

The rule so referred to and the methods of averting the evil consequences likely to arise from its application were thus stated in *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371, 60 N. E. 493: "Upon the death of the intestate, the land in question went to his heirs, the petitioner and the respondent as tenants in common. If needed, a part or the whole of it may be sold by the administrator for the payment of claims against the estate, but until so sold, the title is in the heirs. It is not suggested that it cannot be physically divided so that each tenant can hold in severalty. It may be that hereafter the land, or some part of it, may be sold for the payment of debts, but it is not certain that any of it will be, or that, if any is sold, the equality of the partition will be substantially disturbed. Indeed, if there be a partition, and a sale afterward is necessary, it is within the power of the probate court to see to it that the land selected for sale be such that the equality be not disturbed. To say that there shall be no partition until it is apparent that neither of the parties can be evicted by any sale of the administrator is to say that, in cases where any part of the land may be needed for the debts, the heirs shall be deprived of a right to partition, as to any of it, and cannot have the consolation of individual ownership during the little time the law casts the title upon them. The litigation over this account of the administrator may

extend for years, and meanwhile upon this theory the petitioner must endure the inconveniences of common ownership. Nor can any injustice be done to the parties. In case of any eviction by sale after the partition, the evicted party is not without remedy. Such eviction would be by a title a little older and better than that of the parties to the partition, and would come within the terms of Public Statutes, chapter 178, section 43. It is true that this section as originally enacted was made applicable only to partition by proceedings in the common-law courts, but it was simply declaratory of the common law."

The application of the general rule hereinbefore stated cannot be avoided by proving that the party whose right is contested claims under a will which is still subject to be contested and its probate set aside: *Robertson v. Brown*, 187 Mo. 452, 106 Am. St. Rep. 485, 86 S. W. 187; nor that the executor has, by direction of the probate court, been ordered to take possession of the property and that it remains in his possession or that of his lessee: *O'Brien v. Ash*, 169 Mo. 283, 69 S. W. 8; nor that an application for the sale of the property is pending and undetermined in the probate court: *Reubel v. Reubel*, 47 Misc. Rep. 474, 95 N. Y. Supp. 966.

II. Statutes Withholding the Right Until the Settlement of the Estate.

By a provision of the Revision of Connecticut of 1875, of the title "partition," it is provided "that no application for the partition or sale of any part of any estate, pending for settlement, shall be made until after the settlement of the administration account, and the settlement of such estate," and the court expressed the opinion that such would be the law independently of the statute: *Beecher v. Beecher*, 43 Conn. 556. In Iowa, apparently uninfluenced by any statute, the court was inclined to the view that, as the heirs take the land subject to the debts of their ancestor, which can be enforced by proceedings in the probate court, and as the interest of the heirs cannot be determined until the extent of the indebtedness is known, and until it is further determined just what land or what interest therein is subject to partition, lands could not be partitioned until it was determined what interests the heirs had in them, nor just what lands were subject to partition: *Thomas v. Thomas*, 73 Iowa, 657, 35 N. W. 693; but this case is explained, if not overruled, by the decision in the principal case (ante, p. 581). In Louisiana, the heirs of a decedent appear not to be entitled to partition until after the close of the administration of the estate, though a judgment has been entered therein ordering them to be put in possession: *Succession of Landry*, 17 La. 193, 41 South. 490. By the Revised Statutes of Missouri, 1899, section 4394, it is provided that if lands are descended to any parties, and the court is not satisfied that the estate from which such lands were descended has been finally settled and

all claims against it discharged, or that the personal property or real property not already partitioned belonging to the estate is more than sufficient to pay all claims and demands against the same, the order of distribution shall not apply to or take effect upon any of the lands allotted or adjudged to the parties whose interests shall have so descended until such estate shall have been finally settled and all claims against it discharged. Under this statute, however, it is necessary, to defeat a partition, to show that there are debts outstanding against the estate of the decedent, where it further appears that he has been dead sixteen years, and that no creditor has sought to administer upon his estate: *Chapman v. Kullman*, 191 Mo. 237, 89 S. W. 924. A statute substantially similar to that of Missouri exists in Nebraska: *Schick v. Whitcomb*, 68 Neb. 784, 94 N. W. 1023. Under the statutes of Nebraska, the probate court, during the administration of an estate, may make an allowance for the necessary expenses of the support of the children of the deceased under seven years of age, and it is the duty of the executor or administrator to retain in his hands sufficient estate for that purpose, and the court is not permitted to assign any estate to the heirs or devisees until after the payment of the debts, funeral charges and expenses of administration, and after the discharge of the allowance made for the support of the children and the assignment to the widow of her dower and her share in the personal estate. Therefore, it has been held that an action in that state cannot be maintained unless it appears that the debts, allowances and expenses against the estate have been paid or provided for, or the plaintiff has given bonds to secure the payment of the same: *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065. Partition was also denied for want of settlement of the estate, and no particular statute was cited by the court, in *Adams v. Beideman*, 33 N. J. Eq. 77, and *Williams v. Mallory*, 33 S. C. 601, 11 S. E. 1068.

III. Giving Time to Settle the Estate.

Sometimes, and apparently without any statute so directing, it has been held that proceedings to partition the property of a decedent cannot be maintained until the lapse of the time within which the executor or administrator must settle the estate and the creditors must present their claims against it: *Keim's Estate*, 201 Pa. 609, 51 Atl. 337. Hence, the supreme court of South Carolina said: "Now, while we are not aware of any statute, or any decision of a court of last resort, which forbids the bringing of an action for partition before the expiration of twelve months from the death of the intestate, yet, as we understand it, it was a settled rule of practice observed by the former chancellors, not to entertain a bill for partition until after the expiration of twelve months from the death of the intestate, for at least two very good reasons: 1. Because, as has been said above, the administrator is allowed twelve months within

which to ascertain whether there are any debts due, and until that period has expired, the court cannot know legally, or with any certainty, whether there are debts; and surely it would be wrong to partition the estate of the intestate before it had been ascertained whether there are debts due, and provision made for their payment; 2. Such a practice would tend to defeat the rights of innocent creditors of the intestate, for it has been held that a creditor cannot subject the lands of his intestate to the payment of his debt, where such lands have gone into the actual and exclusive possession of the heirs before the creditor has commenced his action for the recovery of debts, either by partition or otherwise: *Huggins v. Oliver*, 21 S. C. 147; and if the lands have been sold before action brought by the creditor, the statute 3 and 4 Wm. and M. would forbid his subjecting the lands, in the hands of the purchaser, to the payment of his debt. Now, as section 2322, Revised Statutes, forbids a creditor from commencing an action against the administrator for the recovery of any debt due by the intestate until after the expiration of twelve months from the grant of administration, it is obvious that if an action for partition should be entertained before the expiration of the twelve months, the rights of creditors might and probably would be defeated. The only instances, so far as we are informed, in which this salutary rule of practice has been disregarded are the cases of *Pearson v. Carlton*, 18 S. C. 47, and *Williams v. Mallory*, 33 S. C. 601, more fully reported in 11 S. E. 1068, and the confusion, delay, and necessary expense which resulted in those cases, from a disregard of this salutary rule, afford ample illustrations of its wisdom": *Ex parte Worley*, 49 S. C. 41, 26 S. E. 949.

IV. Discretion of the Court to Prevent Injustice in the Application of the General Rule.

Though the right to commence and maintain suits for partition is sustained, notwithstanding the jurisdiction of probate and other courts to settle and distribute the estates of decedents through which the title to the property in question was derived, courts generally, and perhaps universally, seek to adopt such precautionary measures as seem most likely to prevent the sacrifice of the interests of parties not before the court, or whether before the court or not, who may acquire rights under the further orders or decrees of the probate court having jurisdiction. Where the sale of the property is ordered, this is accomplished by keeping the proceeds within the control of the court or otherwise in such a condition that they may be applied to the extinction of liabilities against the property, such as the debts of the decedent or the charges of administration or legacies chargeable against such property: *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806; *Watke v. Stine*, 214 Ill. 563, 73 N. E. 793; *Wise v. Wolfe*, 27 Ky. Law Rep. 610, 85 S. W. 1191; *In re Dusenberry's Estate*, 34 Misc. Rep. 666, 70 N. Y. Supp. 725; *Jouffret v. Loppin*, 20 App. Div. 455, 46 N. Y. Supp. 810. In Nebraska, an heir or devisee is entitled

to partition only when he shows that the charges against the estate have been paid, or that there is sufficient personal estate in the hands of the executor or administrator to pay them, or that the person seeking partition has given a proper and sufficient bond for the payment of such charges: *Reckeway v. Waltemarth*, 28 Neb. 492, 44 N. W. 659; *Schick v. Whitcomb*, 68 Neb. 784, 92 N. W. 1023; and substantially the same rule applies in Texas: *Hyatt v. Venters*, 41 Tex. 285; *Moore v. Moore* (Tex. Civ. App.), 31 S. W. 532. Probably the best method of procedure in the absence of a statute controlling the action of the court, where it is that an action or suit for partition ought not to proceed because of the pendency of proceedings in the administration of the estate of a decedent, is for the court to consider and determine whether the claim is well founded, and if so, while entertaining the suit and affirming its jurisdiction therein, still to stay or delay the proceeding until the question can be determined in the probate or other court having jurisdiction of the estate of the decedent: *Snyder v. Snyder*, 75 Iowa, 255, 39 N. W. 297; *Clarity v. Sheridan*, 91 Iowa, 304, 59 N. W. 52; *Garrison v. Cox*, 99 N. C. 478, 6 S. E. 124; *Hendry v. Hollingdrake*, 16 R. I. 477, 17 Atl. 50; *Trowbridge v. Caulkins*, 17 R. I. 580, 23 Atl. 1102.

V. Where a Part Only of the Estate has been Acquired by Devise or Descent, as where one of several cotenants dies, there can be no serious doubt that such death neither terminates nor suspends the right of the surviving cotenants, or of any of them, to compel partition. In such a case, however, the court in partition will seek to avoid taking any action which will annul or embarrass such orders as may thereafter be made by court having jurisdiction of the estate of the decedent. If the whole property is directed to be sold, the court may, having first declared the share belonging to such decedent, and declared that it belongs to those who are entitled to the real estate of which he died seised, leave their rights to be determined by the court having jurisdiction of his estate: *Grant v. Murphy*, 116 Cal. 427, 58 Am. St. Rep. 188.

KENDIG v. McCALL.

[133 Iowa, 180, 110 N. W. 458.]

EXECUTION SALES—Right of Purchaser to Redeem from Foreclosure.—One who has, within the statutory period allowed for redemption from a foreclosure sale, acquired the mortgagor's title by an execution sale, has the same right to redeem from the foreclosure which the mortgagor might have exercised had his title not been divested by the intervening sale on execution. (p. 595.)

MORTGAGES—Foreclosure—Redemption—Remedies.—The statute providing a summary method of settling controversies as to the right to redeem from foreclosure sales, or the amount to be paid, is not an exclusive remedy, and one who is entitled to redeem may tender the amount necessary to make redemption, and if his tender is refused, may assert his right in a court of equity without filing the affidavit provided for by such statute. (pp. 596, 597.)

J. A. Guiher, for the appellants.

Steele & Robbins and G. H. Seevers, for the appellee.

¹⁸¹ McCLAIN, J. Plaintiff, having secured a judgment against one Low, purchased the forty-acre tract of land in controversy in this case at sheriff's sale under his execution against Low on the second day of January, 1904. At this time an action against Low, brought by E. E. McCall, the principal defendant in the present action, was pending, in which McCall asked the foreclosure of a mortgage on the same tract of land. In this foreclosure proceeding the present plaintiff, Kendig, was joined as defendant. A decree of foreclosure in McCall's action against Low was entered in February, 1904, and on March 18th following the land was sold to McCall under special execution in such foreclosure proceeding. On February 9, 1905, Kendig sought to redeem from the foreclosure sale to McCall, and made further effort to do so on the 15th of March following, but the clerk refused to allow him to make redemption, and on ¹⁸² April 15, 1905, a sheriff's deed was issued to McCall in pursuance of the sale in foreclosure.

Two questions are involved in this appeal: First, one of fact as to whether Kendig took the necessary steps between January 2 and March 18, 1905, to effect redemption; and second, one of law, as to whether plaintiff was entitled to make such redemption.

1. Without setting out the evidence in detail, as to the sufficiency of the steps taken by plaintiff to make redemption.

it is sufficient to say that it clearly appears that on February 9th, and again on March 15, 1905, plaintiff appeared before the clerk of the court expressing his desire to make such redemption, and having the ability to do so, and that on each occasion he was refused the right on the ground that he was not entitled to redeem. There cannot be the slightest doubt under the evidence that, if the officer had on either occasion conceded plaintiff's right to make such redemption, it would have been effected. The clerk did not object to the sufficiency of the tender or offer, but insisted that plaintiff had no such right. If the right to redeem is established, then the sufficiency of the attempt to redeem was also sufficiently established, and the trial court properly found that plaintiff had done all that was required of him in the way of attempting to exercise his right.

2. The right of plaintiff to redeem is denied on the ground that he was entitled to make redemption only as creditor under Code, section 4046, within nine months after the date of the foreclosure sale, and although he had taken a deed under execution on January 2, 1905, which was after the expiration of nine months and before the expiration of one year from the date of the foreclosure sale, he was not entitled to redeem under Code, section 4045, providing that "the debtor may redeem real property at any time within one year from the day of sale." The fundamental question involved, then, is whether, under Code, section 4045, one who has, within one ¹⁸⁸ year after the foreclosure sale, acquired the debtor's title by an execution sale may assert the same right to redeem which the mortgagor might have exercised had his title not been divested by the intervening sale on execution. This question has, as we understand it, been practically determined by this court. We have held that the debtor may transfer his right to redeem within one year from an execution sale so as to authorize his grantee to make the same redemption which the debtor himself might have made: *Moody v. Funk*, 82 Iowa, 1, 31 Am. St. Rep. 455, 47 N. W. 1008; *Harms v. Palmer*, 73 Iowa, 446, 5 Am. St. Rep. 691, 35 N. W. 515; *Thayer v. Coldren*, 57 Iowa, 110, 10 N. W. 300. And in *Thayer v. Coldren*, 57 Iowa, 110, 10 N. W. 300, it was held that, under section 3102 of the Code of 1873, slightly differing in language from the corresponding provision in section 4045 of the present Code, "the defendant" who was entitled to redeem within one year from the date of the sale

included the person who was the owner of the land to be redeemed. In that case it was said that, while there was no provision expressly authorizing the vendee of an execution defendant to redeem from a sheriff's sale, such right was secured to him under the provision authorizing redemption by the "defendant."

The only question left for determination, therefore, is whether one who has acquired title from the mortgagor by sale of the mortgaged property under a prior execution stands in the same position as one who has acquired such title by a voluntary conveyance. We see no reason for a distinction between a purchaser at a voluntary sale and one at an involuntary sale. In either case the purchaser acquires all the rights of the debtor, and we hold that the execution purchaser acquires the right of his debtor to redeem from a foreclosure sale of the property, and that he may make such redemption under the provisions of Code, section 4045, authorizing the debtor himself to redeem within one year. The plaintiff was not obliged to content himself with the right to redeem within nine months as a judgment creditor, but he might, if he saw fit, wait until he ¹⁸⁴ had acquired his debtor's complete title by taking a sheriff's deed within the year allowed to his debtor to redeem from the foreclosure sale, and then exercised the absolute and unqualified right of redemption which his debtor would otherwise have had. In effect, the controversy is simply as to which creditor shall have the property on paying off the claims of the other in the event that the debtor himself does not exercise the right of redemption. After January 2, 1905, McCall had no right to redeem from Kendig, for Kendig's execution sale had matured, and he was entitled to, and had received, a deed, and we see no reason why, under this deed conveying to him the entire right in the property of his debtor, he should not, as against the foreclosing creditor whose sale had not yet matured into a right to a deed, exercise the right of redemption which the debtor would otherwise have had.

3. It is contended, however, for the appellant that, as appellee's right to redeem was contested by the clerk acting under the instructions of appellant, the appellee should have proceeded under the provisions of Code, section 4057, to have such contest determined by filing an affidavit in connection with his tender of the amount necessary to make redemption. This is what the clerk insisted that the appellee should

do, and it was on the ground of appellee's refusal to make such affidavit that the clerk refused to receive and receipt for the amount tendered in redemption. This statutory provision first appears in the Code of 1897, and, as indicated by the code commissioners in their report, was inserted for the purpose of providing "a method of settling controversies as to the right to redeem, or the amount to be paid." But there is nothing in the language of the section itself, nor in the explanation given by the code commissioners to indicate that the remedy provided in that section was intended to be exclusive of the remedy previously existing under which the person entitled to redeem might tender the amount necessary ¹⁸⁹⁵ to make such redemption and then assert his right in court by proper proceeding. Without regard to the provision of Code, section 4057, the appellee was unquestionably entitled to make his tender, and, if it was refused, to proceed as he did in equity to have the deed which had been wrongfully made set aside and his statutory right of redemption secured to him. We think the only object and effect of Code, section 4057, is to enable the person desiring to redeem to test his right in a summary way, so that it may, if possible, be established before the time for redemption has expired, and this would often be a valuable privilege, for it might enable him to ascertain in what respect his effort to redeem was insufficient, but, if he sees fit to assert his right in a proper manner, and is subsequently able to show that he did, within the proper time, make a sufficient tender, we see no reason why he should not have relief in a court of equity against the denial of the right which has been admittedly asserted. We reach the conclusion, therefore, that appellee's refusal to file an affidavit such as is contemplated by Code, section 4057, in connection with the tender of the amount necessary to redeem did not defeat the appellee's right to relief in this action.

The decree of the lower court was therefore correct, and it is affirmed.

On Who may Redeem from a Foreclosure Sale, see the note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 245. That a judgment creditor of the mortgagor may redeem, see *People v. Bowman*, 181 Ill. 421, 72 Am. St. Rep. 265; *Preston-Parton Mill Co. v. Horton*, 22 Wash. 236, 79 Am. St. Rep. 928; and that a junior mortgagee may redeem from a senior encumbrance, see *Threefoot v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39.

McCLURE v. GREAT WESTERN ACCIDENT ASSN.

[133 Iowa, 224, 110 N. W. 466.]

INSURANCE, ACCIDENT—Roadbed of Railroad.—A provision of an accident insurance policy exempting the insurer from liability when the injury is received while the assured is on the roadbed of a railroad company, applies where he is injured while walking between the double tracks of a railroad used for running trains in opposite directions, the rails being ten feet apart on the inside of the tracks, and the distance between passing engines being four feet. (p. 603.)

Bailey & Stipp, for the appellant.

W. B. Barger, for the appellee.

225 **BISHOP, J.** The defendant, as its name implies, is a corporation doing an accident insurance business. The plaintiff, a real estate broker and a policy-holder in said association, met with an accident in June, 1904, resulting in a total permanent disability. He made claim for the sum of twelve hundred and fifty dollars, the full sum provided in the policy to be paid in case of total disability; and, payment being refused, he brought this action to recover.

Several defenses are pleaded, but the one upon which reliance is principally placed is based on a provision of the policy, in substance, that the injuries insured against shall not include those received while the assured is on the roadbed of any railroad company, except while crossing at a public highway, but that in such case the liability of the association shall not exceed one hundred and twenty-five dollars for total disability. The court refused requests for instructions presented by defendant limiting the right of recovery on the policy to the sum of one hundred and twenty-five dollars, and submitted the question to the jury as to whether at the time of the accident plaintiff was on the roadbed of a railroad **226** company. Appellant contends that here was error, and in view of the record we think the contention must be sustained. In his petition plaintiff states the circumstances of his accident to be that while on his way to the railroad depot in Chariton, this state, he was overtaken by a railway train, and was struck by the pilot of the engine drawing such

train and thus injured. The written notice of accident given by plaintiff to the defendant association, and the proofs of loss or injury made by him as required by the terms of the policy, were attached to the petition by copy, and made a part thereof, and were also introduced by plaintiff in evidence. In each thereof it is stated in explicit terms that plaintiff was injured while walking on a railroad track, and by being struck in the back by a locomotive engine. As a witness, plaintiff testified that he started for the depot to mail some letters. "I went along the street past the Bates House, and then north along the path on the railroad right of way. I was in a hurry and took that way as I had often done. I left the sidewalk and took the path between the tracks, and after I had gone some distance I saw a fast freight train coming down the track from the north. There was a cloud of dust and smoke and steam, and I remember an effort to get away from it, and everything then was a blank." Other witnesses testified that at the place of the accident the railroad is double tracked, and that the distance between the tracks was about ten feet; that such intervening space was ballasted to correspond with the tracks, and covered with cinders. Whether there were eye-witnesses to the accident does not appear, but it would seem certain that as plaintiff stepped away from the track on which the freight train was approaching he was struck in the back by an engine approaching from the south on the other track. Indeed, such is the fact theory of counsel for appellee as presented in argument.

Taking this to be the situation, was plaintiff on the roadbed of a railroad company within the meaning of that expression as contained in the policy? At first blush it ²²⁷ would seem conclusively certain that he was, because otherwise he could not have been struck by the engine moving along on and over the rails composing the railroad track. But counsel for appellee does not admit of soundness in this view. It is his contention that upon the facts proven it was an open question as to the position of plaintiff at the time he was struck; that conforming the meaning of the term "roadbed," as defined in law, and this counsel interprets to be that portion of the roadway included within the lines marked by the ends of the ties, usually a distance of one foot outside each rail, the jury may well have found as matter of fact his position to be outside of the limits of the roadbed, although not so far removed as to be beyond reach of a passing train.

This contention we shall consider in the spirit of seriousness with which it is made, because, if sound in law, it must be said that the case was properly submitted to the jury, and, accordingly, the judgment should not be disturbed. We quite agree that the term "roadbed" does not of necessity include the entire right of way. From the standpoint of engineering it is the bed or foundation on which the superstructure of ties and rails is made to rest. This is the definition common to all the authorities: Webster's International Dictionary; Century Dictionary; 7 Words and Phrases, 6255. If, now, the superstructure be placed upon the natural surface of the ground, or perhaps at the bottom of a cut, it would seem reasonable to say that in strictness the roadbed extended no farther outward than the respective lines marked by the ends of the ties. If, on the other hand, the superstructure is placed on a grade, or raised surface, it seems clear that the term must be held to include all portions of the superstructure, from base line to base line, or, at least, so far as designed to serve the purpose in view. This must be so because the term naturally implies a condition not of undisturbed nature, but resulting from the constructive work of human hands guided by a specific purpose. And no reason presents itself to our minds, and there is no authority in the ²²⁸ books as far as we have been able to discover, for saying that only that portion thereof resting between lines carried down perpendicularly from the respective ends of the ties when in place must be given exclusive designation as the roadbed. As ordinarily constructed, the portion of the foundation outside the lines marked by the superstructure is just as necessary to the intended purpose as that portion directly underneath. The work is constructed as a whole, and to one end, and must therefore be taken as a whole for the purposes of general definition.

But when all this is said—and perhaps we have given more time to the phase of the subject than necessary—it remains to be said that it is neither necessary or proper to apply the definition of a roadbed in its strict sense to the term as it is used in an accident insurance policy. In such connection "the phrase 'walking or being on a railway bridge or roadbed' is not to be construed with absolute literalness": *Traders' & T. Acc. Co. v. Wagley*, 74 Fed. 457, 20 C. C. A. 588. Ordinarily, a railroad track does not of itself present a condition of danger, either hidden or obvious. It becomes dan-

gerous only in connection with its use in the operation of trains thereover. And from this the conclusion follows, as we think, that the exception found in the policy in suit—an exception common to most accident policies—was intended to have force only in the event of an injury connected in its origin with the matter of train operation. Certainly there can be no reason for saying that it was intended to bar a right of recovery if the accident was such in character that it could have been made the basis of a recovery had it occurred elsewhere than on the roadbed of a railroad company: 4 Cooley on Insurance Briefs, 3187, citing *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205; *Dougherty v. Pacific Mut. L. Ins. Co.*, 154 Pa. 385, 25 Atl. 739. On the contrary, the purpose of the exception was to prohibit the exposure of his person by the assured to the dangers to be apprehended from moving engines or cars. "The condition ²²⁰ is a warranty by the assured that he will not intrude upon that part of the roadbed which is not also a part of the highway or public thoroughfare; that he will not loiter upon the track, but does not obligate him not to cross the railroad bed at the place provided for the public to cross it": Joyce on Insurance, sec. 2625; *Payne v. Fraternal Acc. Assn.*, 119 Iowa, 342, 93 N. W. 361. As aptly said in *Metropolitan Acc. Assn. v. Taylor*, 71 Ill. App. 132: "The exception is intended especially to guard against the evil of what is known as 'track-walking,' which is necessarily very dangerous." And from this it follows as matter of course that, if an assured shall voluntarily and unnecessarily put himself in the prohibited position, he must be held to have assumed the risk.

Now, as constructed, an embankment forming a roadbed may in fact extend to the limits of the right of way, or it may happen that the ties and rails are laid at the bottom of a cut or on the natural surface of the ground simply made smooth for that purpose. Accepting of the purpose and intention of the policy exception as concluded foregoing, there could be no reason for extending the operation thereof to include all that portion of the constructed bed which is so far removed from the tracks as to preclude danger from a passing train. Thus, in *Standard etc. Co. v. Langston*, 60 Ark. 381, 30 S. W. 427, it was held that an exception similar in wording to that found in the policy before us could not be construed "to include in its meaning the ends of the ties

of unusual and extraordinary length, and extending to a place where there can be no possible collision with trains, and where persons standing or sitting would be beyond the reach of injury from passing trains." So, in the case of track laid in a cut or in the natural surface, we think it would be not only out of reason, but absurd, to say that the exception cannot be given application if it shall be made to appear that the assured was standing or walking outside the line marked by the ends of the ties, but not far enough distant to escape injury from a passing train. It ²³⁰ does not seem necessary to fortify this position by an extended citation of authorities. But see *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787. There the policy in suit prohibited the assured from "standing or being upon a railroad track or bed of a railroad." The trial court had instructed the jury in substance that such policy provision was intended to prohibit the assured from standing or walking upon a railroad track or so near thereto that he would be likely to be hit by trains passing or repassing upon the railroad; that this would be the construction put upon the language of the policy by the public generally, and the company had the right to expect that the assured would so understand it. On the appeal it was insisted that here was error, but the contention was brushed aside, and the doctrine of the instruction given unqualified approval. Our view thus taken is not in conflict with *Payne v. Fraternal Acc. Assn.*, 119 Iowa, 342, 96 N. W. 361, as counsel for appellee seems to think. There the accident occurred while the assured was crossing the railroad tracks, following a well-beaten way that had long been used by the general public. And we held such a public crossing within the meaning of the policy, and that it was not incumbent on the assured to ascertain by investigation whether such way had been regularly laid out by the public authorities or dedicated to public use. Quite different from this is the case of one who is injured while walking longitudinally along a railroad track. And in such case it can make no difference how frequently the assured had so walked the track before, or how many other persons had in like manner exposed themselves to danger. The track is none the less the roadbed of a railroad company: *Weinschenk v. Aetna L. Ins. Co.*, 183 Mass. 312, 67 N. E. 242.

Now, whether appellee was on a roadbed, in the sense of that expression as used in the policy, was, of course, a ques-

tion of fact for the jury to decide if there was any room for doubt about it. In our view the situation as disclosed by the record left no room for doubt. It will be remembered²³¹ that here were double tracks, each used for through traffic by trains running in opposite directions, and situated ten feet distant from each other. It was shown in evidence that the cylinders of a locomotive engine extend outward three feet over the rail. It thus appears that there was seven feet of space between the engine on the track and the rail of the other track, and as trains passed each other there was but four feet of space left to be occupied by a man's body. Surely, no reasonably prudent man would hazard his life by standing or walking between the tracks while a swiftly moving train, with its accompaniment of noise, dust, smoke, escaping steam, and suction of air, was passing by. Much less would he undertake to stand on the space intervening between passing trains, swiftly moving in opposite directions, and, at best, within a few inches of his body. Should one attempt to do so and escape alive, the incident might well be written down as a miracle. Regardless, then, of the character of construction, the ground between the tracks must be said to have been part of the roadbed of a railroad within the meaning of the policy. It was a place of great danger, and of almost certain injury from passing trains to one who should persist in walking thereon. No better illustration of this could be had than plaintiff's own case. He appreciated the danger of too close proximity to the freight train he was facing, and in seeking to avoid it he incurred the danger from the passenger train approaching from behind. At least he was on the roadbed when he was struck, and, as we have seen, it can make no difference whether at the time he was within one foot or three feet from the track rail.

Counsel for appellee cite our attention to the case of *Meadows v. Pacific Mut. L. Ins. Co.*, 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578, as announcing doctrine to the contrary. And in a sense this would appear to be so. We cannot undertake to review the opinion in detail. Suffice it to say that there the assured was killed in the accident. When found, the lower limbs were lying between the main track rails,²³² while the trunk of the body was outside the south rail. Between the main track and a sidetrack to the south was an intervening space of ten feet, and this had been cindered and made smooth to walk on. How the deceased came to be at

the place, or what were the circumstances of his accident could not be made to appear, as it was night-time and there were no eye-witnesses. The action was defended on the grounds that the deceased had voluntarily exposed himself to an obvious danger, and was on the roadbed of a railway, all contrary to the provisions of the policy sued upon. A demurrer to the evidence had been overruled by the trial court, and the correctness of this ruling, the opinion says, presented the decisive question in the case. And, after considering the doctrine of presumptions, the court proceeds to say: "It follows that by invoking these presumptions plaintiff not only established a death by violence, but that his intestate was in the exercise of ordinary care and prudence when he met his death, and that it was caused by accident. Nor is this presumption rebutted by the unexplained fact that his body was found mangled upon a railroad track. There were many purposes for which he might lawfully go upon or across the railroad track." The opinion makes it appear that the trial court in instructing the jury took occasion to say that the intervening space between the main and passing tracks was not a part of the roadbed of the railroad within the meaning of the policy exception. This instruction was upheld, the court saying: "It would be most unreasonable to hold that merely because this space was a portion of the right of way one seeking passage on the trains of the company, or called there on business, to meet a relative or friend on business or in the discharge of a social duty, should be charged with want of care for his welfare. There was ample space, upon a well-worn and smoothly trodden path, and the court committed no error in declaring this space not a part of the roadbed." Assuming that plaintiff's intestate had been walking on the space, ²³³ and was there when struck, and addressed to the claim made by the defendant that he had voluntarily and unnecessarily placed himself in the place of obvious danger—a subject matter evidently uppermost in the minds of the court—the argument of the opinion might have some force. Addressed to the subject matter really in hand it is wholly without force. It is fair to conclude that the court did not consider the subject in all its bearings, and this is made more evident by the fact that the holding is sought to be supported by the cases of *Follis v. United States M. A. Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807, 28 L. R. A. 78, and *Standard etc. Ins. Co. v. Langston*, 60 Ark. 381, 30 S. W. 427.

In the former case the subject matter was not involved, while the latter case, as we have seen, is an authority to the contrary.

Accepting of the case at bar, as made, it is our conclusion that the trial court erred in refusing the request for instructions, and the judgment must be, and it is, reversed.

For Authorities bearing upon the question passed upon in the principal case, see Meadows v. Pacific etc. Ins. Co., 129 Mo. 76, 50 Am. St. Rep. 427; De Loy v. Travelers' Ins. Co., 171 Pa. 1, 50 Am. St. Rep. 787.

THOMASSEN v. DE GOEY.

[133 Iowa, 278, 110 N. W. 581.]

EXECUTION SALES—Person Holding Contract of Purchase.—

The interest in land held by virtue of a contract of purchase is subject to levy and sale, and the lien of the judgment and levy attaches to the interest in the land, and cannot be divested by a subsequent surrender of the contract. (p. 606.)

EXECUTION SALES—Collateral Attack.—Irregularities in an execution sale, not rendering it absolutely void, cannot be questioned in injunction proceedings. (pp. 606, 607.)

CONTRACTS—Assignment of.—A stipulation of nonassignability in a contract will not prevent its transfer, subject, however, to all defenses which would have been available in the hands of the assignor. (p. 607.)

W. H. Keating and G. J. Thomassen, for the appellants.

L. A. Wells and J. F. and W. R. Lacey, for the appellees.

279 WEAVER, J. On February 27, 1904, John G. Thomassen, then the owner of the land in controversy, entered into a written contract for its sale to William Van Wyk, who made a partial payment on said purchase and took possession of the premises. On September 22d of the same year the appellee, John De Goey, having obtained a judgment against Van Wyk in the district court of Marion county, caused a transcript of the same to be filed in Mahaska county, and on the same day, under an execution issued upon said judgment, the sheriff of the latter county levied upon said land. Sale under said levy was had on October 31, 1904, at which the property was struck off to said De Goey. On October 26, 1905, three days before the expiration of the period of redemption, act-

ing upon the theory and claim that Takje Van Wyk, wife of the judgment defendant, was the owner of a one-half interest in the contract, the plaintiff George J. Thomassen took from her and her husband a quitclaim deed of the property. About the same time it is claimed that William Van Wyk verbally abandoned and surrendered his said contract of purchase to the seller John G. Thomassen, and soon after gave up the possession and has since made no claim to the land. Within a day or two after this transfer and surrender to the plaintiffs this action was begun in equity to restrain the issuance of a sheriff's deed on the claim that the sale or attempted sale of the interest of William Van Wyk in said land was ineffectual to pass any interest to the purchaser. The district court dismissed the bill, and plaintiffs appeal.

Both the case and the appeal are without merit. The attempt of the plaintiff, George J. Thomassen, to trace title through the wife of William Van Wyk has no support in the evidence, and we need not further consider it. That the interest of Van Wyk in the land by virtue of his contract of purchase was ²⁸⁰ property and subject to levy is elementary. Counsel seem to argue the appeal on the theory that the levy of the execution was in some manner a levy upon the contract of purchase, rather than upon the judgment debtor's interest and property right in the land, but this is not correct. The judgment became a lien upon the Van Wyk interest in the land from the date of the levy of the execution, if not before, and no conveyance or voluntary surrender by Van Wyk thereafter made or attempted could have the effect to take that interest from under the levy or defeat the sale which had been made. True, if the contract was one in which a right of forfeiture had been reserved to the seller and good cause of forfeiture has arisen, he could have enforced it against the purchaser at sheriff's sale in the same manner and to the same extent that he could have enforced it against Van Wyk. But no such forfeiture has been attempted, and the purchaser at the sale is entitled to a deed pursuant to the sheriff's sale. This gives him no unjust advantage, for he takes the property subject to the seller's rights under the contract. If the seller gets the price for which he stipulated, and may still enforce his contract according to its letter and spirit, he is not in position to complain.

It is claimed that there were some irregularities in the notice and in the conduct of the sale. It is possible that such

irregularities existed, and they might have furnished good or plausible ground for a motion to set aside the sale; but they did not render such sale absolutely void, and it cannot be questioned or set aside in injunction proceedings. Moreover, the alleged irregularities are not clearly established by the evidence.

Reliance is also placed on the fact that by the terms of the contract of sale it was not assignable, and that provision was made for strict forfeiture upon failure of Van Wyk to perform any portion of his agreement. A stipulation of nonassignability in a contract ²⁸¹ will not prevent its transfer to an assignee, subject, of course, to all defenses which would have been available in the hands of the assignor: Code, sec. 3046. There have been no steps taken to effect a forfeiture as the statute provides, and to hold that, whenever a levy is made upon an equity in land held by the debtor under contract, the seller and purchaser may by mutual agreement wipe out the contract and defeat the levy, would be to open an easy and effective avenue to gross fraud.

Counsel for appellant have favored us with a very elaborate and ingenious brief of fifty-seven distinct legal propositions, fortifying each by an array of numerous authorities. It is manifestly impracticable for us to take the time or space to discuss the cases cited. We have examined them all and find nothing in them inconsistent with the conclusion hereinbefore announced.

The decree of the district court is right, and it is affirmed.

The Question Whether the Interest of a Vendee under an executory contract for the purchase of land is subject to execution is discussed in Sweeney v. Pratt, 70 Conn. 274, 66 Am. St. Rep. 101; and the question whether the vendor's interest is subject to execution is discussed in Jones v. Howard, 142 Mo. 117, 64 Am. St. Rep. 546. The general rule is that any interest, legal or equitable, which may be aliened or assigned, is liable to the payment of the owner's debts: Wenzel v. Powder, 100 Md. 36, 108 Am. St. Rep. 380.

PFANNEBECKER v. PFANNEBECKER.

[133 Iowa, 425, 110 N. W. 618.]

DIVORCE—Desertion—Cessation of Intercourse.—Cohabitation, as well as marital intercourse, must be abandoned and there must be a complete separation to constitute such desertion as entitles the unoffending spouse to a decree of divorce. (p. 609.)

DIVORCE—Desertion—Refusal to have Marital Intercourse.—If the condition of health of a wife is such as to justify her in declining to indulge in marital intercourse, such conduct does not constitute desertion. (p. 609.)

DIVORCE—Cruelty.—Persistent nagging on the part of a wife, together with her unfounded accusations of infidelity on the part of her husband, not impairing his health so as endanger his life, does not constitute such cruelty as justifies divorce. (p. 616.)

W. C. Gambell and C. M. Brown, for the appellant.

F. L. Goeldner, W. F. Wagner and Stockman & Hamilton, for the appellee.

425 LADD, J. The parties hereto were married September 2, 1891, and lived together happily until July, 1897. One child, Grace, was born in 1896, and the other, Malcolm, in 1898. This action was begun in September, 1905, and resulted in a decree of divorce in favor of the husband with the custody of both children and the exclusion of the wife from the home with a monthly stipend for support money. The relief granted was based on two grounds: 1. That **426** the wife had willfully deserted her husband by declining to have sexual intercourse with him for a period of two years; and 2. That she had been guilty of cruel and inhuman treatment such as to endanger his life. These will be considered in the order mentioned.

1. The parties continued to live in the same house and slept in adjoining rooms up to the time the action was begun. She denied cessation of intercourse prior to April, 1905, while he testified this had not occurred since April, 1903. Every opportunity was afforded, as they continued to have free access each to the bedroom of the other. Indeed, his testimony is utterly without corroboration, save in her aversion thereto, owing to causes hereinafter mentioned, and the testimony of a neighbor that defendant had told her that she did not desire any more children and had locked her door since Malcolm was born as the safest preventive. Even if she said this, the parties are agreed that it was not so. The situation illustrates the difficulties involved in such proof were denial

of sexual indulgence alone to be regarded as a ground of divorce. The language of our statute precludes us from so holding, were we inclined, and we are not, for a divorce is authorized on this ground only "when he willfully deserts the wife and absents himself without reasonable cause for the space of two years": Code, sec. 3174. This statute is equally applicable where the wife deserts the husband. It is not sufficient that one duty or that all save one be neglected. There must be a complete separation of the parties by the one absenting himself or herself from the other. The ecclesiastical courts which formerly exercised jurisdiction in matrimonial cases in England did not sever the ties of marriage on the ground of desertion, but undertook the restoration of conjugal rights only. In so doing distinction was made between marital cohabitation and sexual intercourse, the courts going no further than to restore the former. The remedy for desertion in this country is divorce, but to constitute ⁴²⁷ desertion it would seem that that must be lost which the ecclesiastical courts were able by their decrees to restore, namely, marital cohabitation, and such is the voice of the great weight of authority: *Fritz v. Fritz*, 138 Ill. 436, 32 Am. St. Rep. 156, 28 N. E. 1058, 14 L. R. A. 685; *Segelbaum v. Segelbaum*, 39 Minn. 258, 39 N. W. 492; *Schoessow v. Schoessow*, 83 Wis. 553, 53 N. W. 856; *Throckmorton v. Throckmorton*, 86 Va. 768, 11 S. E. 289; *Steele v. Steele*, 1 McAr. (D. C.) 505; *Anonymous*, 52 N. J. Eq. 349, 28 Atl. 467. See, also, *Stewart v. Stewart*, 78 Me. 548, 57 Am. Rep. 822, 7 Atl. 473, and *Southwick v. Southwick*, 97 Mass. 327, 93 Am. Dec. 95, where it is held not to constitute "utter desertion": 14 Cyc. 612. There are respectable authorities to the contrary, but construing statutes essentially differing from that of this state: See *Fink v. Fink*, 137 Cal. 559, 70 Pac. 628; *Whitfield v. Whitfield*, 89 Ga. 471, 15 S. E. 543; *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. These decisions seem to have been unduly influenced by the opinion expressed by Mr. Bishop in his work on Marriage and Divorce, sections 778, 779, and which has not been followed by the better considered cases. In none had a statute expressly making the absenting of the spouse essential to constitute desertion been so construed, and which, as we think, leaves no escape from the conclusion that cohabitation as well as marital intercourse must be abandoned to constitute such desertion as will entitle the unoffending spouse to a decree.

2. There is another reason in this case for denying a divorce on the ground of desertion. This, to support the decree, must have been without reasonable cause, and if it were to be conceded that the wife declined to indulge the plaintiff's passions, her physical condition was such as to justify her in so doing. In giving birth to the first child the neck of her womb was lacerated, and, although this may have been repaired, as testified by plaintiff, it is reasonably certain that it was not restored ⁴²⁸ to its normal condition. She testified to a discharge ever thereafter, and that intercourse often was painful and followed by hemorrhage. He admitted that she sometimes complained of suffering pain. This to one not skilled in medicine would plainly indicate a condition requiring further repair, but plaintiff, though saying he examined the parts, discovered nothing wrong. She denied that any examination was made and is strongly corroborated by the circumstances. After the birth of the second child she became exceedingly averse to intercourse, and the cause was not discovered until examination by Dr. Oliver, September 21 or 22, 1905. He testified:

"Found the neck of the womb torn and very tender, with a patch of granulations about the size of a five-cent piece, the right upper prolapsus tender and enlarged, and she complained of pain in her right side, just below and anterior to the right shoulder, to the front of the shoulder, and also on the right side of the neck. Her pulse was 72. That was the side where the breast was removed. Her temperature was 98, and she was quite nervous. I said 'torn'; it means the same as laceration. The trouble probably continued from one of her confinements—which one I could not say. The ulcer occupied a space of the mouth of the womb about the size of a five-cent piece. The mouth or whole cervix is about as large as a twenty-five cent piece. The cervix means the lower end of the womb. There was some discharge from the ulcer. The birth of a child is the commonest thing to cause laceration. It could be caused by other causes. It could be caused by manual disturbance, or sometimes caused by delivering a large tumor. The symptoms which usually accompany laceration of the womb are tenderness, the lips of the cervix all worked out, making it tender, with a discharge, with granulations or inflammation. I would expect that coition would be painful in defendant's case. It was tender over the right ovary. That tenderness might have been pro-

duced by some inflammatory action. It probably followed from the laceration of the womb. The inflammation of the ovaries frequently happens from lacerations. The majority of patients are nervous and get more ⁴²⁰ nervous the longer standing the case is. If long continued, it will seriously affect the health of the patient. The patient is inclined to be irritable. I think it has affected the defendant both in a nervous and in a physical way. Some patients have desire for sexual intercourse, and some do not. The longer these troubles are allowed to run the more effect they have on the nervous system."

Cross-examination: "I should think that intercourse would be painful under the conditions I found existing in this case. I think it would cause aversion to intercourse. I would not expect patients to solicit intercourse, nor advise them to have it."

Redirect examination: "Under the condition I found existing, blood would sometimes follow the act of intercourse." This evidence is undisputed, save by the plaintiff's claim that he had examined defendant and discovered nothing of the kind, to which, as previously intimated, in view of what has been mentioned and Dr. Oliver's testimony, we are not inclined to give credence. A more reasonable explanation is that the defendant, becoming engrossed in the practice of his profession and money getting, and wearied by the complaints and fault-finding of her whom he had promised to cherish in sickness as well as in health, neglected to give her ailments the care and attention her condition demanded, and as a consequence much that he now complains of happened. To what has been said should be added the fact that she underwent a surgical operation in the removal of a breast in January, 1894, and we have a very satisfactory showing of a reasonable cause for declining conjugal intercourse.

3. While defendant's physical condition cannot excuse her for extreme cruelty, it is proper that it should be taken into consideration in weighing her conduct. The plaintiff has gathered the disagreeable things in their married life since 1897 and recited them in detail. They exhibit his wife as an extremely jealous ⁴³⁰ and somewhat selfish individual. From the fact that all went well with them prior to this time, it may be inferred that her physical difficulty in gratifying her husband may have influenced her suspicions of his infidelity.

She conceded at the trial that these were without foundation, but not that her accusations were insincere at the time of making them. Moreover, the record plainly indicates that she is a somewhat eccentric woman, and of her peculiarities in this respect the plaintiff is not in a situation to complain. He took her as she was, for better or for worse. With the further observation that there was no proof of physical violence, actual or threatened, and that reliance for relief necessarily rests upon the prospective effect of defendant's somewhat persistent nagging and accusation of infidelity upon plaintiff's health, we may advert as briefly as may be to the main charges lodged against her, as bearing upon the two inquiries: (1) Whether these were cruel; and, if so, (2) whether the life of plaintiff was endangered thereby.

In July or August, 1897, upon her invitation a young lady friend visited her, accompanied by a baby sister. The child was taken sick with scarlet fever. Defendant demanded her immediate removal from the house. The plaintiff isolated her with the sister and her mother, who came to care for the child, in an upper room and treated her until she had recovered. The evidence is in conflict as to whether she declined to furnish food for them or they refused to receive it, and she objected to the neighbors bringing eatables. Certain it is that she accused her husband of being unduly intimate with the young woman, and when the latter departed told her never to return to her house again. At a later date she objected to him treating a woman some fifty-five years old because not responsible, with the intimation that their relations were improper, and in 1903, owing to her objection that he was "too thick" with the woman's daughter, he was compelled to give up an engagement to assist in an operation on the latter. In 1898 he claimed, and she denied,⁴⁸¹ that she accused him of being unduly intimate with a trained nurse who had cared for her in confinement, and upon his report that his sister had given birth to another child he says she denounced his brother in law as a bull, while she attributes worse language to him. When he returned from his office late, she would inquire what woman he had been entertaining there. When the children were sick in 1902 she objected to plaintiff entering Malcolm's room while the nurse was there. He claimed, and she denied, that she frequently inquired of the children who were at his office. She criticised

a couple of ladies for stopping in his office while waiting for the lodge on the floor above to open, and said if she had known to whom a plant, left in his office until it should be called for, belonged, she would have thrown salt on it. On one occasion, upon his return from a medical meeting, she denounced doctors as butchers and cut-throats. He claimed, and she denied, that she repeatedly referred to women patients of good repute as "dirty things," and like designations, and declared that, if he could not make a living without working for them, he ought to go and shoot himself. After the operation in 1904 she said little or nothing to him for several months; would often leave the room when he entered. She had told the children that she would not attend the World's Fair at St. Louis, but upon discovering that her husband, in taking them, would be accompanied by two other families, changed her mind twenty-four hours before starting, and went. He took a seat with other ladies of the company, and upon falling asleep his hat fell in the lap of a widow, who held it. Defendant noticed this and chided him. Upon reaching St. Louis she concluded that she was unable to be on her feet long enough to go over the fair grounds, and on the second day departed for a visit with her mother at Centralia. She requested plaintiff to stop for her on his way home, which he did, and found that she had left the day before. She explained this by saying that her mother was called to the deathbed of another ⁴³² daughter, and she did not wish to remain after her departure. Later she accused plaintiff of having paid the expenses of the widow to the fair. She insisted that the women who were his patients wore their best dresses on the streets to show off, and that they ought to be at home attending to their families. At other times she declared that but for their sexual excesses they would not need treatment. She denounced his employés as immoral, and found fault with a tenant's character, saying, as he testified, that she hoped that the building "would go up in smoke." Undoubtedly she regretted her second pregnancy. But what he claims she said, which she denied, does not indicate that she did more than give an intimation of the desirability of an abortion. The record fails to show a purpose to have an abortion committed. He testified that she persisted in talking to him of these matters far into the night; that, when he would express the desire to go to sleep, she would say, "You've got to take it; you can't go

to sleep; you have got to hear what I am going to say." She denies all this, but admitted going to his room freely when he had retired, but claims never to have remained after he expressed a desire to go to sleep. Plaintiff also related that at one time when Malcolm was putting on his gown she said, "I hope Malcolm will never need another gown"; that in the following morning, upon inquiry as to her meaning, she explained "that there is nothing in this world for him." Shortly after this she said to plaintiff in a conversation that she could kill him, and later, after he had retired and she had been in his room talking and he had fallen asleep, she returned, when he heard a noise, awakening him with a start. He immediately turned on the light and saw her standing about two feet from the door, and asked, "What do you want?" To which she responded, "You don't need to be afraid; I won't hurt you." This, according to plaintiff, greatly shocked him. The defendant did not recall the circumstance of entering his room, and satisfactorily explained ⁴³³ the other incident. She discouraged him in his profession and sought him to abandon it. She objected to his absence from her more especially when sick. Plaintiff repeatedly warned his wife that, if she persisted in her accusations, it would be impossible for him to live with her. At first she asked forgiveness, and did better for a time. Upon their return from the World's Fair he testified she declared that, if he was going to get a divorce, she would do something that would ruin his practice, while she insists that she merely suggested a separation without a divorce. According to the doctor he never talked back save to answer her questions.

Enough has been said to indicate the character of defendant's treatment, without adverting to her insinuations as to some of his patients, her alleged neglect in preparing meals for him, her insistency that he obtain meals nowhere else, and possibly some other matters. The plaintiff's evidence was somewhat corroborated by the testimony of his sister that defendant had said to her that she used to think she could not see the children get sick and die without their father, but could now, and that she thought he was running after other women, and that if he was and some one shot him, she would not shed a tear; by that of Mrs. Kracht, who in cautioning children in front of the house not to throw water from the hose into the road, as this would scare her

horse, had said to them, if they did, she would tell their father, whereupon defendant said, "You will tell his papa, will you? He will soothe all your trouble for you"; by that of Mrs. Wagner that she did not want more children, and therefore locked her door as the best prevention, and advised her to do the same, and that she had heard her say as much to another, that she thought the doctor unduly intimate with other women, and aimed to be at his office Wednesday and Saturday afternoons, as there were certain ladies she desired to watch; that he did not do as much as he could in treating the witness and others, and that she ⁴³⁴ thought the profession unclean (this witness says she often thought defendant's mind not right); by that of Gus Kratch that she arranged a meeting with him at the office and inquired if plaintiff had paid the expenses of the widow to the World's Fair; by that of Mrs. Moore that, when the neighbors brought eatables when the child was sick with scarlet fever, she ordered them away, and that she prepared an article for publication concerning that case, and that she heard the remark to Mrs. Kracht; by that of Eva Fish, who worked for her eight months, that she expressed a wish the doctor would give up his practice, and that a certain young lady would stay away from his office, but that she did not hear her criticise him otherwise; by that of Neuman that plaintiff had grown pale and more forgetful and thinner in the last few years. It will be noted that the only material corroboration of plaintiff's testimony is of the accusations of infidelity to his marriage relations. His claim that she robbed him of sleep by compelling him to listen to her talk nearly every evening until far into the night is entirely uncorroborated, and, though she may have been exceedingly annoying at times, we are not inclined to think he was in danger of being talked to death. Nor are her aspersions on the medical profession and request that he abandon it entitled to much consideration. When in ill-health she doubtless felt, without duly appreciating the demands of his profession, that he ought not absent himself from her, and told him so. Otherwise what she said was connected with the accusation of infidelity which in the last analysis constitutes the only basis for a finding of legal cruelty.

We have repeatedly held that such accusations of the wife, by the husband, when malicious and unfounded, may be such cruelty as to endanger life: *Evans v. Evans*, 82

Iowa, 462, 48 N. W. 809; *Haight v. Haight* (Iowa), 82 N. W. 443. The difference in the situation of the husband is manifest. If innocent, he is not likely to regard seriously idle suspicions, even though lodged against him by his wife, nor is the ⁴³⁵ effect on his character and position in society to be compared to that upon a female. On this ground the supreme court of Texas has held this charge against the husband does not amount to cruelty, unless it is shown that from his temperament or calling it has or will be likely to produce mental suffering beyond the ordinary effect which such a charge would naturally have upon a man: *McAllister v. McAllister*, 71 Tex. 695, 10 S. W. 294. In *Carpenter v. Carpenter*, 30 Kan. 712, 46 Am. Rep. 108, 2 Pac. 122, the wife not only accused the husband of infidelity to the marriage relation, but sought for scandal, affecting his moral standing, to humiliate him in his own estimation, and to disgrace him in the opinion of all good people, and her conduct was adjudged to amount to extreme cruelty. In *Kline v. Kline*, 49 Mich. 419, 13 N. W. 800, the charge of adultery was coupled with other abuse indicative of ungovernable violence of temper: See, also, *Holyoke v. Holyoke*, 78 Me. 404, 6 Atl. 827; *Robinson v. Robinson*, 66 N. H. 600, 49 Am. St. Rep. 632, 23 Atl. 362, 15 L. R. A. 121. Whether one spouse has been so treated by the other as to endanger his life is a pure question of fact. It cannot be declared as a matter of law that any particular treatment will constitute such cruelty. A course of conduct which would so impair the health of one person as to endanger life might produce no effect on another of different aspirations and sensibilities. Most men, if innocent, would decline to treat seriously idle chattering about their relations with the opposite sex, while others, owing to their associations and different temperaments, might chafe more or less seriously under an unjust charge of this kind. As to whether this feature of the case alone seriously disturbed the plaintiff, the record is silent. Possibly this was because the defendant went no further than to indicate her suspicions, and these, as expressed to others, save in one instance, did not reach plaintiff. He attributes his change of health generally to "the trouble at home," and testified that his nervous system was wrecked, ⁴³⁶ and that he had become troubled with insomnia and forgetfulness as a result. This, as seen, finds scant support in the record, which indicates, also, that he is a man of strong physique and not of an especi-

ally nervous temperament, and not such a person as would be likely to be much troubled over his wife's unfounded suspicions. Undoubtedly he was greatly annoyed by her talk, and possibly his fears may have been unduly aroused by her appearance in his bedroom on one occasion. But these were unfounded, and, though he may rue his bargain in marrying a woman somewhat eccentric in character and too much given to fault-finding, he is in the situation of many another husband as well as wife who bears the matrimonial yoke under like conditions in philosophic endurance. For such, when this does not amount to legal cruelty, the law affords no relief. True it is that words and deportment may work injury as deplorable as violence to the person. One of Shakespere's characters is made to say, "I will speak daggers to her, but use none."

We are satisfied, however, upon a separate examination of the entire record, that the evidence falls far short of showing that a continuance of the marriage relation by these parties will be attended with any danger to the plaintiff's life, and that, with the restoration of defendant's health, which, with appropriate treatment, seems probable, much that has been objectionable in her conduct will be obviated. She may continue to talk more than wisdom dictates, but divorce cannot be made the panacea for the infelicities of married life. If disappointment, suffering, and sorrow even be incident to the relation, it must be endured. The marriage yoke cannot be thrown off merely because it rides unevenly. The petition should have been dismissed. Appellee's motion to dismiss is merely a renewal of a like motion previously overruled, and is likewise overruled, as is also appellant's motion to strike appellee's additional abstract. Appellant is allowed the sum of one hundred and fifty dollars with which ⁴³⁷ to compensate counsel for prosecuting this appeal, and the same will be taxed in her favor as a part of the costs of the case.

Reversed.

DESERTION AS GROUND FOR DIVORCE.

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I. Definition.

Desertion, within the meaning of the divorce laws, consists in the actual ceasing of cohabitation and the intent in the mind of the offending party to desert the other: *Morrison v. Morrison*, 20 Cal. 431; *Stein v. Stein*, 5 Colo. 55; *Johnson v. Johnson*, 22 Colo. 20, 55 Am. St. Rep. 112, 43 Pac. 130; *Bennett v. Bennett*, 43 Conn. 313; *Lynch v. Lynch*, 33 Md. 328. Desertion is the voluntary separation of one spouse from the other without justification, and with an intention of not returning: *Williams v. Williams*, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98, 14 L. R. A. 220. Desertion, to constitute ground for divorce, must be an abandonment of one spouse by the other without any good reason, or without such a reason as the party upon probable proof believes to be sufficient: *Powell v. Powell*, 29 Vt. 148. Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of the matrimonial cohabitation, and, secondly, an intent to desert in the mind of the offending party, and both must combine to make the desertion complete: *Latham v. Latham*, 30 Gratt. 307; *Tillis v. Tillis*, 55 W. Va. 198, 46 S. E. 926. Desertion in the divorce law is the voluntary separation of one of the married parties from the other with intent to desert, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or the wrongful conduct of the other: *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11. To establish desertion three things must concur and must be proved; these are cessation from cohabitation continued for the statutory period, intention in the mind of the deserter not to resume cohabitation, and the absence of the other party's consent to the separation: *Rose v. Rose*, 50 Mich. 92, 14 N. W. 711; *Davis v. Davis*, 60 Mo. App. 545; *Sergeant v. Sergeant*, 33 N. J. Eq. 204.

II. Legal Elements of.

a. **Intent to Abandon.**—To constitute desertion as a cause for divorce there must not only be a separation, but also an intent to cease to live together as husband and wife, together with an abnegation of all the duties of the marital relation: *Kupka v. Kupka*, 132 Iowa, 191, 109 N. W. 610; *Lynch v. Lynch*, 33 Md. 328. Desertion is not only a cessation of cohabitation, but must also be without the con-

sent of the other party, and with the intention not to return. Mere separation and nonsupport do not alone constitute desertion: *Moak v. Moak* (N. J. Eq.), 48 Atl. 394; *Dignan v. Dignan*, 17 Misc. Rep. 268, 40 N. Y. Supp. 320. There must be an abandonment by the offending party with a fixed determination upon his part, without good cause, to separate from and refuse to provide for the support of the wife: *Orr v. Orr*, 8 Bush, 156. To prove desertion it is essential to show that the absence of the defendant was not justified by the conduct of the plaintiff, that it was continued for the statutory time without any intention on the part of the absentee during that period to resume the marital relation and that plaintiff never consented to nor acquiesced in the separation: *Hall v. Hall*, 77 Mo. App. 600. It must be shown that the libelee left the libelant with the intention of not rejoining her again, or having left with the intention of returning, that he afterward determined to abandon her, and that this intention or determination was persevered in for the statutory period, and continued to the time of the filing of the libel: *Davis v. Davis*, 37 N. H. 191. Such circumstances must appear as manifest a settled and determined purpose on the part of the offending party to withdraw from his wife permanently his society and protection, and to withhold from her the means necessary for her support: *Ruckman v. Ruckman*, 58 How. Pr. 278. A letter written by a wife to her husband, stating, in response to his request for information, that she never intended to live with him again, indicates a willful desertion: *Edwards v. Edwards*, 69 N. J. Eq. 522, 61 Atl. 531. An intent expressed by the wife to abandon her husband and to "remain away from home forever," followed by her going away to remote places and staying between two and three years, constitutes desertion: *Allen v. Allen*, 194 Pa. 419, 45 Atl. 375. It is the sole fact of the separation by the offending spouse for the requisite time with the continuing intention not to perform matrimonial obligations which entitles the innocent spouse to a divorce: *Besch v. Besch*, 27 Tex. 390. The mere absence of the husband or wife from the matrimonial domicile, without an intent to discontinue the marital relation, is not, in a legal sense, a desertion, but such absence becomes desertion as soon as the absentee abandons the intention of returning: *Fulton v. Fulton*, 36 Miss. 517. In legal contemplation, the husband is living with his wife, though driven by stress of circumstances and pecuniary difficulties to absent himself from home and wife in an effort to better provide for his family, and he ceases to live with his wife only when, with an intention to never return, he deserts or abandons her: *Walton v. Walton*, 76 Miss. 662, 71 Am. St. Rep. 540, 25 South. 166.

Absence from the wife for three years is not necessarily desertion in law, but the circumstances and manner of the absence must be shown, that the court may determine the intent: *Rogers v. Rogers*, 18 N. J. Eq. 445. The abandonment must be willful, and with an intention to live apart, and the intention to abandon is the criterion:

Ahrenfeldt v. Ahrenfeldt, 1 Hoff. Ch. 47. In so far as the decisions cited maintain that there must be a failure of the husband to provide for his wife, and that there must also be an intent to desert, they are doubtless sufficiently correct for ordinary contingencies, but when cases actually arise necessarily presenting the question, some of them may call for more careful statement. Thus, desertion and failure to provide are under some statutes separate grounds for divorce, and, whether they are or not, the terms are by no means synonymous, though the conditions described by them are often coincident. While it usually happens that the deserting spouse also fails in the duty of support, yet it is not difficult to imagine a course of conduct which is necessarily desertion, though there is no failure to discharge the marital financial obligations: *Ezlas v. Ezlas*, 171 Ill. 632, 49 N. E. 717; *Power v. Power*, 66 N. J. Eq. 320, 105 Am. St. Rep. 653, 58 Atl. 192; *Yates v. Yates*, 59 N. J. Eq. 100, 43 Atl. 436. So though separation and desertion are by no means synonymous, and there is never any desertion from separation due to the ordinary necessities of human employment, and rarely any desertion without an intent to permanently abandon cohabitation, yet if such abandonment takes place unnecessarily and is long continued, without any other reason apparent than the preference not to discharge the marital duties, then we think the intent necessary to desertion should be conclusively presumed, and the injured one should be entitled to divorce on the ground of desertion, though the offending spouse may never have formed any intention as to his future course, or may have entertained a vague purpose of reassuming the matrimonial obligation at some indefinite time: *Rathburn v. Rathburn*, 76 Mich. 462, 43 N. W. 307; *James v. James*, 58 N. H. 266; *Kaster v. Kaster*, 43 Mo. App. 115; *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820.

b. Separation by Consent.—A separation with the consent or acquiescence of the parties does not constitute desertion, no matter how long continued: *Lea v. Lea*, 8 Allen, 418; *Cox v. Cox*, 35 Mich. 461; *Simpson v. Simpson*, 31 Mo. 24; *Droege v. Droege*, 55 Mo. App. 481; *Davis v. Davis*, 60 Mo. App. 545; *Latham v. Latham*, 30 Gratt. 307. The separation of husband and wife, acquiesced in by the wife, and which she did much to bring about, however long continued, with no sincere overtures to terminate such separation, does not constitute desertion nor authorize a divorce on her petition: *Hankinson v. Hankinson*, 33 N. J. Eq. 66. Where husband and wife agree to live separate and apart, there can be no divorce on the ground of desertion: *Secor v. Secor*, 1 McAr. 630. A petition for divorce filed by the husband will be dismissed when it appears that his wife left with his consent, and he has not invited her to return: *Smithson v. Smithson*, 18 D. C. 227. A bill for divorce on the ground of desertion will not lie, where the parties are living apart under articles of separation, or by mutual consent, and where the party seeking the divorce has not expressed a desire to terminate the agreement: *Moore v.*

Moore, 16 N. J. Eq. 275. Neither husband nor wife can make a separation which was begun and prolonged by their common act and consent, and which neither has ever made an effort to terminate, a ground of complaint for divorce: *Gilmer v. Gilmer*, 37 Mo. App. 672. The action of the wife in leaving her husband under a mutual agreement of separation does not constitute desertion such as will entitle the husband to a divorce: *Masterson v. Masterson*, 20 Ky. Law Rep. 631, 46 S. W. 20. If it appears that the desertion alleged was entirely agreeable to the petitioner, and in a manner superinduced by her own conduct, and manifestly against the wishes of her husband, a divorce for that cause cannot be obtained: *Rutledge v. Rutledge*, 5 Sneed, 554. To constitute a desertion, the separation must be against the will of the complaining party, as it does not lie with one who consents to, or approves of, the separation to complain of it as a desertion: *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193, 45 Atl. 261. If a husband, not entirely blameless for the act, makes no effort to prevent his desertion by his wife, and acquiesces in and appears satisfied with its continuance, he is not entitled to a divorce on the ground of desertion: *Herold v. Herold*, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696. To establish a case of desertion sufficient to authorize divorce, it must appear that the wife left her husband of her own accord, without his consent, and against his will, or that she has obstinately refused to return without just cause on the request of her husband. Desertion cannot be inferred from the mere unaided fact that the parties do not live together: *Jennings v. Jennings*, 13 N. J. Eq. 38. If a husband and wife have been living apart by mutual consent, there must be proof that the consent was withdrawn, and that the marital duty was demanded by one of the parties, in order to establish willful desertion: *Currier v. Currier*, 68 N. J. Eq. 7, 59 Atl. 4. Desertion of husband by wife is made out when it is shown that the absence commenced and has continued for two years, without the consent and against the objections of the other party: *Benkert v. Benkert*, 32 Cal. 467. A wife leaving her husband, who was drinking heavily, cannot procure a divorce on the theory of constructive desertion, where the separation was not forced upon her by his drunkenness, but was brought about by consent, and in order to relieve the husband, who was in financial straits until he should be able to procure employment and provide a suitable home: *Foote v. Foote* (N. J. Eq.), 61 Atl. 90.

c. **Time When Desertion Begins.**—Desertion must be regarded as beginning when the intention not to return is formed: *Phelan v. Phelan*, 12 Fla. 449. A voluntary separation becomes desertion from the time that the complaining party makes sincere overtures to terminate it, and the offending party refuses, and manifests an intent to stay away: *Hankinson v. Hankinson*, 33 N. J. Eq. 66. If a husband leaves his wife, intending to return, and afterward decides to stay away, the desertion will begin to run from that decision: *Reed*

v. Reed, Wright, 224. If a wife having left her home with her husband's consent, with intent of making a visit to her mother, subsequently changes her purpose and refuses to return, her absence is not a willful desertion from the time of her departure, but only from the time the intent to stay away was formed: Conger v. Conger, 13 N. J. Eq. 286. Separation and intention to abandon must concur to constitute the desertion contemplated by the statute, but they need not be identical in their commencement. If one spouse should leave the other on business, and afterward determine not to return, the desertion would commence from the time such intention was formed: Pinkard v. Pinkard, 14 Tex. 356, 65 Am. Dec. 129.

d. **Duration and Continuity of Separation.**—In nearly all of the states the statute fixes the period of time through which the separation of husband and wife must continue, to entitle the offended spouse to divorce, and it is universally decided that such separation must be continuous and uninterrupted, for the full time prescribed by the statute. Thus, the statute providing that "willful, continued and obstinate desertion for the term of three years" shall be a cause for divorce contemplates a continuous and uninterrupted desertion: Gaillard v. Gaillard, 23 Miss. 152. Desertion, to be a ground for divorce under the statute relating thereto, must continue uninterrupted for the full period fixed by the statute next before the commencement of the action: Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172, 668; Stymiest v. Stymiest, 16 Pa. Co. Ct. 305. It has also been decided, however, that under a statute authorizing an absolute divorce for willful desertion for three consecutive years, a divorce may be granted where the three years have elapsed at the time of the hearing, though the libel was filed before that time: Hemenway v. Hemenway, 65 Vt. 623, 27 Atl. 609; and to the same effect is McCrocklin v. McCrocklin, 2 B. Mon. 370. A separation of a husband and wife by the latter going to her father's, to constitute a basis for divorce under the statute upon the ground of desertion, must have commenced and existed during the statutory period prior to the filing of the bill, and continued during the whole period without interruption, and mutual treaties and deliberations within that period with a view to living together again are inconsistent with the kind of desertion the statute contemplates as ground for divorce: Rudd v. Rudd, 33 Mich. 101. In Maine, in a libel for divorce, where a desertion by one of the parties of the other is the only cause shown, it must have been continuous for at least five successive years: Ricker v. Ricker, 29 Me. 281; Small v. Small, 31 Me. 493. And in any event it must be shown that the desertion has been a continuous act up to the time of the filing of the libel: Hancock v. Hancock, 5 N. H. 239; Davis v. Davis, 37 N. H. 191. Two periods of desertion, interrupted by a reconciliation, cannot be added together for the purpose of making up the term required by the statute to entitle a husband or wife to a divorce for desertion: Gaillard v.

Gaillard, 23 Miss. 152. But if a husband willfully abandons his wife for the statutory period and contributes nothing to her support during that time, and returns to her home but once during such period, and then simply to get his clothes, the separation is not interrupted, and his wife is entitled to a divorce on the ground of his desertion: *De Armond v. De Armond*, 66 Ark. 601, 53 S. W. 45. If a wife deserts her husband without just cause, and thereafter so wrongfully conducts herself as to justify her husband in suing her for divorce on the ground of her adultery, the pendency of such action, although she be not in fact guilty, will not suspend the term of her desertion, and after the lapse of the statutory period, her husband may sue her for divorce for such desertion: *Wagner v. Wagner*, 39 Minn. 394, 40 N. W. 360.

c. **Duty to Seek Reconciliation.**—A husband cannot accept the departure of his wife from the home as a desertion, and ground for divorce, if he refuses to invite her to return, makes no effort to induce her to resume her place in the household, and rejects her overtures for a reconciliation, even though she was originally in fault in leaving him: *McElhaney v. McElhaney*, 125 Iowa, 333, 101 N. W. 93. A wife's mere absence from her husband, though she wrongfully separated herself from him, is not in itself proof of a willful intent on her part to abandon him sufficient to entitle him to a divorce, unless he in good faith invited her to return or made known to her his willingness to receive her: *Ojserkis v. Ojserkis* (N. J. Eq.), 62 Atl. 113. A wife's desertion is not willful, even if continued for two years, where the husband was partially to blame, and where he made no effort to prevent her going on the day of her departure, nor any subsequent effort to induce her to return, though they met several times thereafter on friendly terms: *Van Wart v. Van Wart*, 57 N. J. Eq. 598, 41 Atl. 965. Willful desertion does not begin until after the offending party has in good faith exhausted all reasonable efforts to right the wrong, and to satisfy the injured wife that there will be no recurrence of the causes which induced the separation, nor until the lapse of a reasonable time for a consideration of the overtures for a reconciliation: *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668. If a wife, in leaving her husband, wrote to him indicating that she had taken the steps because of serious quarrels with her husband's mother, and gave him permission to come and see her, and signed herself in an affectionate manner, there is no willful desertion on her part, and it is his duty to seek his wife and urge a reconciliation: *Edwards v. Edwards*, 69 N. J. Eq. 522, 61 Atl. 531. A separation from her husband by the wife, begun by her without such reasons as would have sufficed on her part to procure a divorce from him, does not entitle him to a divorce on the ground of her desertion, when he neglects to do anything to induce her to return: *Bowlby v. Bowlby*, 25 N. J. Eq. 406. If it appears that the departure of the wife was caused by mistaking the language of her

husband as a consent to her departure, she is not guilty of desertion, if he made no effort to rectify her error by inviting her to return: *Smithson v. Smithson*, 18 D. C. 227. If the husband has not made the advances or concessions which a just man ought to make to put an end to his wife's desertion, induced, though not justified, by his conduct to her, she is not guilty of willful and obstinate desertion: *Cornish v. Cornish*, 23 N. J. Eq. 208. Or, if a wife deserts without cause, and afterward realizes that she has acted foolishly, and would return if the way was opened to her, but her husband refrains from doing anything to induce her to return, for the purpose of making her absence a ground of divorce, her desertion is not willful and obstinate: *Trall v. Trall*, 32 N. J. Eq. 231; *Newing v. Newing*, 45 N. J. Eq. 498, 18 Atl. 196. If the husband's acts are not of such intensity as to amount to desertion, but are such as will justify his wife in temporarily separating herself from him, it is his duty to personally seek her and ask her to return, and, his failure to do this, while he remains passive for many years, manifesting no interest in her welfare or desire to resume marital relations, constitutes desertion, and entitles her to divorce: *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249. Or, if a wife, in anger, tells her husband that he may go his way and she will go hers, and gives other evidence of her desire that they should live separate, but immediately retracts and beseeches him not to go, and he, notwithstanding her entreaties, leaves her in a passion, and, without any attempt at reconciliation or without contributing anything toward her support for a number of years, or even communicating with her in any way, she is entitled to a divorce on the ground of his desertion: *Schauck v. Schauck*, 33 N. J. Eq. 363. It has, however, been held that, in a case of willful and malicious desertion, it is not required of the husband, in order to get a divorce, to show that he has endeavored to induce his wife to return and live with him: *Lanier v. Lanier*, 5 Heisk. 462; *Patterson v. Patterson* (Wash.), 88 Pac. 196. If a husband has deserted his wife without cause, he cannot charge her with desertion by merely showing a request to her to return and come to a particular place and reside with him there, but he must show that he has in good faith offered her a home: *Paul v. Paul*, 75 Ill. App. 383. A husband may be guilty of willful desertion, although articles of separation are signed after he deserts his wife, if he knows that she dissents from the separation, and does not try to induce her to return to him, and is determined to continue the separation: *Power v. Power*, 66 N. J. Eq. 320, 105 Am. St. Rep. 653, 58 Atl. 192. A husband who leaves his home and never offers to return, nor invites his wife to join him at any other place, cannot successfully charge her with willful desertion: *Barrett v. Barrett* (S. Dak.), 105 N. W. 463. If a separation between husband and wife occurs because of the drunkenness and cruelty of the husband, on failure of the husband to reform, and after such reformation to seek out his wife and apply to her to

return, giving her reasonable assurances of the sincerity of his reformation, a divorce for desertion on his part may be properly granted: *Jerolaman v. Jerolaman* (N. J. Eq.), 54 Atl. 166. A wife, when deserted by her husband, is not bound to hunt him up and go to the place where he is, to prevent desertion on her part: *Millowitsch v. Millowitsch*, 44 Ill. App. 357. If a husband deserts his wife, without cause, there is not the same obligation on the wife to endeavor to effect a reconciliation that there would be on the husband were the case reversed, and such failure to try to effect a reconciliation does not make her the deserting party: *Sargent v. Sargent*, 36 N. J. Eq. 644.

Although a wife has deserted her husband without cause for some time, yet if she goes back to him, confesses her wrong, and promises to return and perform her duties, and he refuses to receive her, and, for a number of years neglects to make any provision for her support, such refusal and neglect constitute a desertion, for which she may obtain a divorce: *Hanberry v. Hanberry*, 29 Ala. 719; *Fellows v. Fellows*, 31 Me. 342. An offer on the part of the wife to return before the expiration of the statutory period constituting desertion, after a voluntary abandonment of her husband, precludes him from obtaining a divorce on that ground: *McGowan v. McGowan* (Tex. Civ. App.), 50 S. W. 399. An unconditional offer by the wife to return to her husband's bed and board, after her abandonment of him, refused by him, together with his refusal to contribute to her support, constitutes desertion on his part and entitles her to a divorce: *Gilbert v. Gilbert*, 5 Misc. Rep. 555, 26 N. Y. Supp. 30. But if the original separation was not a desertion on the husband's part, it has been decided that it can only be turned into his desertion by the wife in good faith demanding a resumption of the marital relationship, and the refusal of the husband to accede thereto: *Provost v. Provost* (N. J. Eq.), 63 Atl. 619.

Although a wife leaves her husband's house through his fault, yet if he afterward sincerely solicits her to return and she deliberately and persistently refuses, her conduct then constitutes desertion: *Hooper v. Hooper*, 34 N. J. Eq. 93; *Whelan v. Whelan*, 183 Pa. 293, 38 Atl. 625. It has also been decided that if a wife deserts her husband and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, although during that period he once visited her and occupied the same bed with her for two or three nights, as that fact did not necessarily interrupt the desertion: *Danforth v. Danforth*, 88 Me. 120, 51 Am. St. Rep. 380, 3 Atl. 781, 31 L. R. A. 608. The latter part of the proposition is, in our judgment, not maintainable. If a wife willfully deserts her husband and thereafter brings suit for separate maintenance and he

in no way procured, consented to, nor connived at the separation, he is under no legal obligation to solicit her to return, as her persistence in such desertion and the commencement of such action gives him a right to a divorce: *Hitchcock v. Hitchcock*, 15 App. Cas. (D. C.) 81.

f. Willful Desertion.—Under the statutes of the various states making desertion of husband or wife a ground for divorce, the desertion must be willful, continued, and without reasonable cause: *Sterling v. Sterling* (N. J. Eq.), 63 Atl. 548; *Neely v. Neely*, 131 Pa. 552, 20 Atl. 311; *Rutledge v. Rutledge*, 5 Sneed, 554. Willful desertion, within the meaning of the statutes, must be a desertion without any good reason, or without such reason as the party, upon probable proof, believes to be sufficient: *Powell v. Powell*, 29 Vt. 142. It requires willful desertion to warrant a divorce, and such desertion is a breach of the matrimonial duty, and is composed, first, of a breaking off of the matrimonial cohabitation, and, second, an intent in the mind to desert. Both must combine to make the desertion willful and complete, and noncohabitation alone is not willful desertion: *Tillis v. Tillis*, 55 W. Va. 198, 46 S. E. 926. If a wife leaves her husband, against his will and express direction, with intent not to return, the desertion is willful: *Meier v. Meier*, 68 N. J. Eq. 9, 59 Atl. 234. The words “willful desertion” as used in the statute concerning divorces signify an intentional desertion, but such words do not imply malice: *Benkert v. Benkert*, 32 Cal. 467. But it has also been decided that a husband’s willful absence from his wife, being in legal acceptance malicious, is sufficient to support a decree for divorce on the ground of willful and malicious desertion: *McClurg’s Appeal*, 66 Pa. 366. Husband and wife cannot both be guilty at one and the same time of willful desertion, and either or both be entitled to a divorce upon that ground: *Wass v. Wass*, 41 W. Va. 126, 23 S. E. 537.

III. Facts Constituting Desertion.

a. Cruel Conduct Causing Separation.—If a husband, by his extreme cruelty to his wife, compels her, for her own safety and protection, to seek a home elsewhere than under his roof, she does not thereby desert him, within the meaning of the statute, but, on the other hand, under such circumstances, he is chargeable with the offense of deserting his wife, and she may obtain a divorce on that ground: *Levering v. Levering*, 16 Md. 213; *Market v. Market*, 11 N. J. Eq. 256; *Waltermine v. Waltermine*, 110 N. Y. 183, 17 N. E. 739. If a husband actually drives his wife from himself and his home, or by his cruel treatment compels her to leave it, for her safety and comfort, and he afterward fails to provide her with a home, this is an abandonment, separation and desertion by him, which entitles her to a divorce: *Curlett v. Curlett*, 106 Ill. App. 81; *Starkey v. Starkey*, 21 N. J. Eq. 135. If the cruelty of the husband is suffi-

cient to warrant a divorce *a mensa et thoro*, the wife may lawfully separate from him, and such separation will constitute constructive desertion on his part, and if continued for the statutory period will entitle her to a divorce *a vinculo*: G—— v. G——, 67 N. J. Eq. 30, 56 Atl. 736. If a separation has been occasioned by cruelty of the husband to his wife sufficient to support a decree for divorce against him, he cannot successfully claim that her absence from him for over two years thereafter is a desertion on her part: Crickler v. Crickler, 58 N. J. Eq. 427, 43 Atl. 1064; because if a wife is justified in leaving her husband on account of his cruelty, the separation is legally chargeable to him, and constitutes a legal desertion on his part: Lister v. Lister, 65 N. J. Eq. 109, 55 Atl. 1093. Where a husband's treatment of his wife is so cruel, long continued and persistent as to render separation desertion on his part, and his conduct subsequently is such as to render it unsafe for her to return to him at any time within the period fixed by the statute as constituting desertion after the separation, her right to a divorce becomes fixed: McVickar v. McVickar, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249; Daertes v. Daertes (N. J. Eq.), 38 Atl. 950. A husband whose overbearing and unkind treatment has caused his wife to desert him is not entitled to a divorce on the ground of her desertion, when he has not made advances and concessions at a time and in a manner suitable to obtaining her return: Hall v. Hall, 59 N. J. Eq. 402, 45 Atl. 690.

To justify a wife in leaving the domicile of her husband, with the purpose of remaining away and dissolving the marriage relation, so as to charge him with desertion in a legal sense, which will entitle her to a divorce, his conduct which induced her action must have been such as would have afforded ground for divorce, and the separation must have been against her will: Barnett v. Barnett, 27 Ind. App. 466, 61 N. E. 737; Alkire v. Alkire, 33 W. Va. 517, 11 S. E. 11; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12.

If a husband is compelled to leave and live separate from his wife on account of her cruelty and misconduct, he is entitled to an absolute divorce on the ground of her desertion: Setzer v. Setzer, 128 N. C. 170, 83 Am. St. Rep. 666, 38 S. E. 731.

b. Misconduct Justifying Separation.—Within the meaning of the statute, a husband may as effectually desert his wife by requiring her to leave his house, and denying her the privilege of living with him as by going away himself: Jones v. Jones, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95; Harding v. Harding, 22 Md. 337. Abandonment by a husband of his wife on account of her cruelty does not entitle her to a divorce on the ground of his desertion: Naulet v. Dubois, 6 La. Ann. 403. If a husband, who has not provided a domicile for his wife, takes her to the home of her parents, and without further notice to her, leaves the state for an indefinite period, the wife has a right to a divorce on the ground

of his abandonment and desertion: *Wilcox v. Nixon*, 115 La. 47, 112 Am. St. Rep. 266, 38 South. 890. Violent and outrageous conduct on the part of the wife toward her husband, rendering the proper discharge of the duties of married life impossible, constitutes a desertion on her part, upon his abandoning her, and is ground for divorce: *Lynch v. Lynch*, 33 Md. 328. Although a husband so abuses his wife that she has justifiable cause to leave him, and does leave him, and does not return or offer to return, and he for five consecutive years next after her departure neglects to provide for her maintenance, and does not seek to live with her, yet all this did not constitute desertion on his part under a former statute of Massachusetts: *Pidge v. Pidge*, 3 Met. 257. The desertion of one of the spouses caused and justified by the misconduct of the other is not desertion by the former: *Fera v. Fera*, 98 Mass. 155. The voluntary withdrawal of the wife induced by her husband's cruelty or neglect is not such consent as will deprive her of the right to a divorce, even if her husband should accompany his cruelty or neglect with permission for her to depart from his house and society: *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772. The conduct of a husband toward his wife may be such as to warrant her in leaving him, although it would not entitle her to a divorce, and if her absence is caused by his misconduct, or if he places himself in such a situation as to prevent her return, he will not be entitled to a divorce, although she may have lived separate from him for a number of years: *Gillinwaters v. Gillinwaters*, 28 Mo. 60. A divorce cannot be had for desertion by the wife, where a husband, who was living in adultery, acquiesced in his wife's living apart from him and furnished means for her support until he suddenly stopped such allowance, without having made any request for her to return: *Davis v. Davis*, 60 Mo. App. 545. The mere fact that a husband, by frequent acts of adultery, justified his wife in leaving him, does not render him guilty of the statutory offense of desertion: *Stiles v. Stiles*, 52 N. J. Eq. 446, 29 Atl. 162. But open and notorious support of and cohabitation with another woman while absent from his wife, without her knowledge of the cause of the continued absence, or of his place of residence, or of the business in which he is engaged, or of his ability or lack of ability to support her, when persisted in for the period required by the statute, constitutes willful, continued, and obstinate desertion by the husband: *Carroll v. Carroll*, 68 N. J. Eq. 724, 61 Atl. 383. A wife is not obliged to stay under her husband's roof with his prostitute, and if she leaves his house for that reason and he refuses to support her, he must be understood as having driven her away and abandoned her, and she is entitled to a decree of divorce on the ground of his desertion: *Weigand v. Weigand*, 41 N. J. Eq. 202, 3 Atl. 699. Whenever a husband commits a matrimonial offense which entitles his wife to a divorce, he does that which justifies

his wife in leaving him, and he becomes the deserter: *Weigand v. Weigand*, 41 N. J. Eq. 202, 3 Atl. 699.

The refusal of a wife to live with her husband because of his intemperance and improvidence, though it may be justified on her part, does not constitute willful desertion on his part, nor ground for divorce from him: *Laing v. Laing*, 21 N. J. Eq. 248; *Camp v. Camp*, 18 Tex. 528; *Phinley v. Phinley*, 35 N. J. Eq. 18. But if a husband leaving his wife and then residing in a foreign country becomes a habitual drunkard, and, though able, makes no provision for the support of his wife, and she is thus compelled to live apart from him for the statutory period constituting desertion, such separation may be treated by her as willful desertion on his part: *James v. James*, 58 N. H. 266. Where a wife leaves her husband for justifiable cause and afterward returns to his home with her children on a winter evening and is reluctantly admitted, and after she has warmed herself is told to go, and is pushed out of the house by her husband while begging permission to remain, she, and not he, is entitled to a divorce on the ground of his desertion: *Grove's Appeal*, 37 Pa. 443.

If a husband leaves his wife and goes to another state without providing any home or support for her, and she thereupon leaves the state in order to maintain herself and her children, her act is justifiable, and although her husband returns to the state, and then sues for divorce on the ground of her desertion, she, and not he, is entitled to the decree: *Masten v. Masten*, 15 N. H. 159. If a wife, without apparent fault, leaves her husband for good cause, her act is justified, and he must be regarded as guilty of the desertion: *Camp v. Camp*, 18 Tex. 528. If a husband leaves his home without justifiable cause, his wife and family remaining, and he never offers to return nor invites his wife to join him at any other place, he cannot charge her with willful desertion. Thus, a husband is not justified in leaving the family home, merely because his wife declared that she would not live with him if he continued in the saloon business: *Barrett v. Barrett* (S. Dak.), 105 N. W. 463.

c. **Causeless Separation.**—If a husband abandons his wife without just cause because of a difficulty respecting her property, and soon afterward proposes a reconciliation through a third person, which she refuses, saying that she had made up her mind not to live with him any more, her declaration shows that she consents to the separation, and she is not entitled to a divorce by reason of her husband's abandonment: *Crow v. Crow*, 23 Ala. 583. If, for more than the statutory period before the commencement of the action, a wife has willfully, and without cause, neglected and refused to live with her husband, and all of such time has had an intent to desert him, he is entitled to a divorce: *Carey v. Carey*, 73 Cal. 630, 15 Pac. 313. Under a statute providing for a divorce to the party not in fault for desertion, a husband who leaves his home simply because his

wife scolds and professes an intention never to return, she is entitled to the divorce, although she moved away also, and he afterward returned: *Logan v. Logan*, 2 B. Mon. 142.

A husband is entitled to a divorce from his wife who, in the society of others, treats him with absolute contempt and shows a preference for another man's company against the remonstrances of her husband, and then abandons him for more than a year: *Watkinson v. Watkinson*, 12 B. Mon. 210. If a husband without cause leaves his home and wife and goes elsewhere, without notifying her of his new domicile or making any attempt to enable her to join him, she may obtain a divorce on the ground of his abandonment: *McLean v. Janin*, 45 La. Ann. 664, 12 South. 747. Divorce will be granted a husband, as for desertion, where his wife has left him without cause and against his protest, and in response to her demands he has made provision for her and she has given him a release of all claims upon his property: *Stoffer v. Stoffer*, 50 Mich. 491, 15 N. W. 564. Where a wife leaves her husband without cause and stays away for a number of years, because she desires to live after her own fashion, her husband is entitled to a divorce on the ground of her desertion: *Rathbun v. Rathbun*, 76 Mich. 462, 43 N. W. 307. A judgment in an action by a wife against her husband that he pay her a certain sum per month for her separate support and maintenance until the further order of the court justifies her in living apart from him so long as such judgment remains in force, and the refusal to live with him during such time is not desertion on her part: *Weld v. Weld*, 27 Minn. 330, 7 N. W. 267. If a husband marries his wife for her property, and by fraud obtains it, reducing her from affluence to want, treating her with cruelty and neglect for a time, and then abandoning her and living in open adultery, and also associating himself with a band of thieves, the wife is entitled to a divorce on the ground of his acts and desertion: *Pulliam v. Pulliam*, 1 Freem. Ch. 348. A desertion is established where the wife leaves her husband to keep house for a crippled son by a former marriage, who, in her opinion, needs her constant care and attention, and takes all of her household effects with her, her husband objecting to her going and telling her that he would consider her separation from him a ground for divorce: *Kaster v. Kaster*, 43 Mo. App. 115. A separation and permanent change of domicile by the wife without the consent or knowledge of her husband, and without cause, is a desertion entitling him to divorce: *Deschodt v. Deschodt*, 59 Mo. App. 102. Abandonment of her husband by the wife without just cause, or any excuse, except one she has made for herself by her own misconduct, constitutes a desertion by her, and after the lapse of the statutory period her husband may obtain a divorce: *Grove v. Grove*, 79 Mo. App. 142. A divorce will not be decreed simply because husband or wife went away and they live apart. A mere separation cannot be considered a desertion within

the meaning of the statute: *Wright v. Wright*, 80 Mich. 572, 45 N. W. 365; *Cook v. Cook*, 13 N. J. Eq. 263. If a husband, upon disagreement with his wife, and her declaring that she will not live with him, assents to her going where she chooses, and furnishes money for her support, and never insists, as a condition to her support, that she shall perform her duties as a wife, although he entreats her to come back, the situation has too much the character of a friendly arrangement to constitute a willful desertion: *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42. But if a husband leaves his wife, and fails to return, notwithstanding her request and his promise to so, this, if long continued, is desertion sufficient to entitle her to a divorce: *Brinkerhoff v. Brinkerhoff*, 29 N. J. Eq. 132. If a husband and wife are living with the wife's father, and the latter upbraids the husband for some trivial offense, whereupon the husband leaves the house, requesting his wife to go with him, but she refuses, and never in the next seven years offers to live with him or expresses any willingness to do so, she cannot successfully charge him with desertion: *Mayer v. Mayer*, 30 N. J. Eq. 411. If a wife declares to her husband, with whom she is living in her house, that he must leave the house or else she herself would, and he is not in great fault, his leaving her under such circumstances is not desertion on his part: *Kestler v. Kestler*, 31 N. J. Eq. 197. In *Belden v. Belden*, 33 N. J. Eq. 94, it appeared that a wife left her husband because of his utter inability to support her, and after he had pledged all her property, both real and personal, to pay his debts, and then refused to return to him until convinced of his ability to support her, and he apparently acquiesced in her determination, and six years later she absolutely refused to live with him, and it was held on this state of facts that, prior to her last refusal, there was no desertion on her part.

Where a husband and wife have never lived together, and she evinces a strong disinclination to live with him at all, and repulses his advances toward a reconciliation, their consequent separation is not desertion: *Reece v. Reece*, 34 N. J. Eq. 32. Desertion cannot be considered obstinate and willful on the part of one of the spouses, when the separation is acquiesced in by, and entirely satisfactory to, the other, who neither entertains nor manifests any desire that the separation, nor the causes which brought it about, should cease: *Chipchase v. Chipchase*, 48 N. J. Eq. 549, 22 Atl. 588. A wife cannot establish desertion on the husband's part by proof that he refuses to comply with her demands relative to his habits and manner of supporting her, as her duty is to accept the situation that her husband is able to maintain: *Provost v. Provost* (N. J. Eq.), 63 Atl. 619.

The mere fact that a wife leaves her husband's house, and refuses to return unless he consents to treat her with proper respect before his children and the servants, and to stop his relations from

abusing her, is not sufficient to constitute a desertion on her part, nor to authorize a decree of separation: *Simon v. Simon*, 15 Misc. Rep. 515, 37 N. Y. Supp. 1121; affirmed, 6 App. Div. 469, 39 N. Y. Supp. 573. If, with the consent of her husband, the wife returns to her former home in another county for the purpose of schooling her children, and afterward her husband visits her a number of times and urges her to go back home with him, but she refuses and says that she has a good home where she is, and there is no satisfactory excuse for her refusal to return to her husband's home, her acts amount to willful desertion, and entitle her husband to a divorce: *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820. If a husband contributes to the support of his family to the best of his ability, and his wife leaves him because of his failure to provide, and prays a divorce on the ground of his desertion, she must fail, as her desertion of him is willful and malicious, and without probable cause, and not merely a separation because of incompatibility of temperament: *Van Dyke v. Van Dyke*, 135 Pa. 459, 19 Atl. 1061. If a wife, without any apparent cause, other than her dislike of her husband, voluntarily leaves his home and refuses to return or cohabit with him for more than the statutory period of desertion, although requested in good faith by her husband to do so, the husband is entitled to a divorce on the ground of her desertion: *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11. If a husband has so conducted himself before his wife leaves him as to show a desire to have her leave, and so as to indirectly bring about that result, and she is willing to live with him, and objects only to certain persons whom he is at the time keeping around him, and she at the time she left expected to return to him, the husband is not entitled to a divorce on the ground of her desertion: *McCormick v. McCormick*, 19 Wis. 172.

d. Refusal to Have Sexual Intercourse.—The better rule and the one sustained by the weight of authority is that the refusal of a wife to have sexual intercourse with her husband does not constitute willful desertion, within the meaning of the statutes relating to divorce. The desertion which is made ground for divorce means the abnegation of all the duties of the marital relation, and not of one only: *Fritz v. Fritz*, 138 Ill. 436, 32 Am. St. Rep. 156, 28 N. E. 1056, 14 L. R. A. 685; *Southwick v. Southwick*, 97 Mass. 327, 93 Am. Dec. 95; *Segelbaum v. Segelbaum*, 39 Minn. 258, 39 N. W. 492. The mere refusal by the wife, without physical excuse, for three consecutive years, to have sexual intercourse with her husband does not entitle him to a divorce for willful desertion: *Pratt v. Pratt*, 75 Vt. 432, 56 Atl. 86. If a wife continues to live with her husband and perform her household duties, but withdraws from sexual intercourse with him, she does not willfully and obstinately desert him, within the meaning of the statute, so as to entitle him to a divorce: *Anonymous*, 52 N. J. Eq. 349, 28 Atl. 467. A husband cannot maintain a suit for divorce on the ground of desertion, simply because his wife has denied matrimonial intercourse to him for the

statutory period: *Steele v. Steele*, 1 McAr. 505. Denial of marital intercourse is not utter desertion nor ground for divorce: *Stewart v. Stewart*, 78 Me. 548, 57 Am. Rep. 822, 7 Atl. 473. Continued refusal of sexual intercourse by a wife is not abandonment or desertion justifying a divorce under a statute providing as a ground for divorce that either party has absented himself or herself without reasonable cause for the space of one year: *Williams v. Williams*, 121 Mo. App. 349, 99 S. W. 42. The fact that a husband occupies separate apartments from his wife for a long period, at her insistence, does not constitute desertion on his part: *Throckmorton v. Throckmorton*, 86 Va. 768, 11 S. E. 289. Nor does the fact that a husband left his wife's bed, and slept in another room for months before she departed, constitute adequate justification for her leaving her home, and her continued absence, under such circumstances for the statutory period, entitles the husband to divorce for desertion: *Lammertz v. Lammertz*, 59 N. J. L. 649, 45 Atl. 271.

On the other hand, there are cases which maintain the opposite doctrine, namely, that the actual abandonment of matrimonial cohabitation, without reasonable cause for the statutory period constituting desertion, intentional on the part of the wife, is cause for divorce, although she attends to her other domestic duties: *Rie v. Rie*, 34 Ark. 37. The refusal by a wife to occupy her husband's bed, or to have sexual intercourse with him, and her subsequent departure from his home, if continued for the statutory period, has been held to constitute willful desertion on her part: *Pilgrim v. Pilgrim*, 57 Iowa, 370, 10 N. W. 750. Also, that within the meaning of the law of divorce it is desertion by the wife, though she continues to reside in the matrimonial domicile, for her willfully, persistently, and without justification to deny to her husband all his conjugal rights, with the intention of casting him off as a husband completely. The continuation of this state of affairs for three years affords cause for divorce on the ground of desertion, whether the husband remains in the matrimonial domicile occupying separate apartments from the wife, or withdraws from the house, and lives elsewhere, provided her conduct be contrary to and against his will, and provided his own conduct be the result of hers, and to that extent involuntary on his part: *Whitfield v. Whitfield*, 89 Ga. 471, 15 S. E. 543. In *Graves v. Graves*, 88 Miss. 677, 41 South. 384, it appeared that a wife deserted her husband without cause, and in about one year returned to his house and remained there for a year and one-half, the parties during that time occupying separate portions of the house, and she refusing to cohabit with him, and it was decided that he was entitled to a divorce on the ground of desertion: See, also, *Campbell v. Campbell*, 149 Mich. 147, post, p. 660, 112 N. W. 481.

The refusal of a husband, it has been determined, to recognize the existence of the marital relation, or to live and cohabit with his wife, amounts to an abandonment or desertion, although they sleep

beneath the same roof: *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. In California, the statute, section 96 of Civil Code, provides that persistent refusal to have reasonable matrimonial intercourse as husband and wife, where health or physical condition does not make such refusal reasonably necessary, is desertion, and under such statute, if the husband without cause separated himself from the marriage bed, and did not thereafter seek a renewal of matrimonial intercourse for more than one year, he is guilty of "persistent refusal" to have matrimonial intercourse, and his wife is entitled to have a divorce from him without showing that she solicited his return to the marriage couch: *Vosburg v. Vosburg*, 136 Cal. 195, 68 Pac. 694.

If a husband or wife unites himself or herself with a religious sect, which professes to believe that it is unlawful for a man and wife to cohabit as such, either is entitled to a divorce from the other, upon the refusal of such other to have matrimonial intercourse for such time as the statute prescribes abandonment or desertion as ground for divorce: *Dyer v. Dyer*, 5 N. H. 291; *Fitts v. Fitts*, 46 N. H. 184.

e. **Support During Separation.**—One who absents himself from his wife and abandons all matrimonial relations with her, intending such abandonment to be permanent, is guilty of desertion, notwithstanding he contributes to her support during his absence: *Magrath v. Magrath*, 103 Mass. 577, 4 Am. Rep. 579; *Elzas v. Elzas*, 171 Ill. 632, 49 N. E. 717. Although a husband, after separating himself from his wife and children without lawful excuse, still provides for their support, his conduct may constitute the matrimonial offense of desertion: *Power v. Power*, 66 N. J. Eq. 320, 105 Am. St. Rep. 653, 58 Atl. 192.

It has been decided that a husband cannot obtain a divorce on the ground of his wife's desertion, although she has separated herself from him for more than the statutory period of separation constituting desertion, if during such period he has regularly remitted an allowance to her: *Ralston's Appeal*, 93 Pa. 133; and, also, that if a wife voluntarily separates from her husband on the ground of his cruelty, but receives from him a competent monthly support, there is no such desertion on his part as entitles her to a divorce a vinculo. *G—— v. G——*, 67 N. J. Eq. 30, 56 Atl. 736. But the same court has also decided that if a husband and wife separate on account of her cruelty and under such circumstances as to give him a right to a divorce on the ground of desertion, the fact that he supported her during the separation is not a bar to his right to a divorce: *Gates v. Gates*, 59 N. J. Eq. 100, 43 Atl. 436.

f. **Failure to Support.**—A failure to provide a sufficient support, or even any support for his wife, may not constitute a desertion by the husband: *Davis v. Davis*, 19 N. J. Eq. 180; *Palmer v. Palmer*, 22 N. J. Eq. 88. A mere failure by a husband to furnish his wife with sufficient support is not ground for divorce, nor will he be con-

sidered a deserter if she leaves him for that cause, and so long as a husband shares with his wife whatever means of support he may have, the law makes it her duty to abide with him, and if she leaves him because he does not give her as much or as good as she desires, or as may be necessary, the law considers her a deserter: *Skean v. Skean*, 33 N. J. Eq. 148. If a wife insists upon her husband leaving her because he will not support the family, his departure is not desertion: *Johnson v. Johnson*, 35 N. J. Eq. 20. A wife cannot convert her husband's not contributing to her support into a desertion on his part, by removing to another place and taking board and refusing to receive him: *Lewis v. Lewis*, 6 N. J. Eq. 22. Failure of a husband to supply his wife with money on which to live, or with the necessities of life, does not warrant her in leaving him and suing for divorce on the ground of desertion: *Lanier v. Lanier* (N. J. Eq.), 58 Atl. 1079. That a husband gambles and does not properly support his wife, in consequence of which she leaves him, does not constitute desertion by him on which to decree a divorce: *Sandford v. Sandford*, 32 N. J. Eq. 420.

To justify a decree for divorce on the ground of the desertion of the husband, such circumstances must appear as manifest a settled and determined purpose on his part to withdraw from his wife permanently his society and protection and to withhold from her the means necessary for her support: *Ruckman v. Ruckman*, 58 How. Pr. 278. And it must also appear that the husband is possessed of property out of which he might make provision for his wife's support: *F—— v. F——*, 1 N. H. 198. But a willful and malicious refusal by a husband to permit his wife, who is discharging her own duties, to share with him such means of support as he may have, may be held to be an expulsion from his home, and constitute a desertion on his part: *Palmer v. Palmer*, 22 N. J. Eq. 88.

The vagrancy of a husband which is made ground for divorce by statute applies only to a vagabond husband, who, being able, fails to support his family, and not one who fails of such support for reasons justifiable or otherwise: *Dwyer v. Dwyer*, 26 Mo. App. 647.

g. Inability to Support.—A separation of husband and wife resulting from necessity as from the inability of the husband to provide for the support of the wife does not constitute desertion: *Bennett v. Bennett*, 43 Conn. 313. Where a wife, upon her husband's failure from inability to support her, separates from him and returns to her relatives with his consent, the separation is not a willful and malicious desertion on his part, such as will entitle her to a divorce, although he has ceased to write to her, or to answer her letters: *Ingersoll v. Ingersoll*, 49 Pa. 249, 88 Am. Dec. 500.

Where husband and wife separated by mutual agreement that the husband, who was not able to support her, should go to a distant place and build up a medical practice, and when he was able to maintain his wife, should send for her, and he did not send for her,

and, although, having an opportunity to communicate with him, his wife did not, on her part, terminate the agreement, and it is not shown that he was at any time during the separation able to support his wife, whereby the agreement would terminate by its own limitation, the separation is not a desertion by the husband within the meaning of the statute: *Costill v. Costill*, 47 N. J. Eq. 346, 21 Atl. 35.

Where, on a bill by a wife for divorce from her husband on the ground of his desertion and failure to contribute to her support, it appears that the separation was due to his having sought and obtained employment in another place, and that, during such time they maintained a constant correspondence, and that her letters were such as an affectionate wife would write, and expressed an earnest hope that they would soon be united; that she lived with her parents; that his failure to contribute to her support was not the result of unkindness, or indifference, but of inability consequent upon misfortune in business, and that shortly before the institution of the suit his wife urged him not to send her any money, unless he could spare it, she is not entitled to a divorce on the ground of his desertion: *Bruner v. Bruner*, 70 Md. 105, 16 Atl. 385.

But a husband is entitled to a divorce on the ground of the desertion of his wife, when it appears that she, who was the daughter of well-to-do parents, left him on account of his poverty, and his not being able to support her in anything like the style and comfort which she desired, and that she has no intention to return to him as long as his poverty continues: *Freeman v. Freeman*, 94 Mo. App. 504, 68 S. W. 389. Nonsupport by a husband of his wife is not desertion or ground for divorce, where he has no means or ability to support: *Freeman v. Freeman*, 94 Mo. App. 504, 68 S. W. 389.

h. Refusal to Follow Husband's Change of Domicile.—The husband has the right to choose the place of residence of his family, and it is the duty of the wife to accompany and live with him in the home so selected, unless there is good reason for her refusal to do so, and her failure so to do is desertion, authorizing divorce: *Hunt v. Hunt*, 29 N. J. Eq. 96; *Cutler v. Cutler*, 2 Brewst. 511; *Angier v. Angier*, 7 Phila. 305; *Buell v. Buell*, 42 Wash. 277, 84 Pac. 821. The refusal of the wife to accompany her husband on a change of his residence, followed by an actual cessation of matrimonial cohabitation, unattended by any excusing or explanatory circumstances is evidence of desertion, and authorizes a divorce: *Hardenberg v. Hardenberg*, 14 Cal. 654. The refusal of a wife to accompany her husband to his new home within their own country, without just cause, is desertion on her part: *Gahn v. Darby*, 36 La. Ann. 70; *Chretien v. Chretien*, 5 Mart., N. S., 60; *Schuman v. Schuman*, 93 Mo. App. 99. A husband is not guilty of deserting his wife without reasonable cause where she declines to go with him to a new abode of his choice, or if she consents to his living

apart from her in such an abode, and he in the meantime offers to perform all of his duties to her: *Schuman v. Schuman*, 93 Mo. App. 99. If the husband establishes a new home and requests his wife to follow him there, and furnishes her with the means with which to travel, and she declines to take up her residence with him, the husband is not thereby guilty of deserting his wife, while she is in fact the deserting party: *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213.

The wife of a skilled mechanic, both husband and wife being natives of England, where they were married and where several children were born to them, who refuses to accompany her husband when he moves to America to better his condition in life, and who, on two occasions afterward, when he has sent her money sufficient to bring her and the children in a comfortable manner to America, again refuses to come, can be found guilty of utter desertion, which will justify the granting of a divorce to her husband: *Franklin v. Franklin*, 190 Mass. 349, 77 N. E. 48. But the refusal of a wife to accompany her husband to a foreign country is not of itself a willful and malicious desertion, within the meaning of the statute relating to divorce: *Bishop v. Bishop*, 30 Pa. 412. If a wife leaves her husband in the state of their domicile and comes into another state, his omission to come and join her there is not desertion on his part: *Frost v. Frost*, 17 N. H. 251.

An agreement by a woman before her marriage to live, when married, in the house of and with her mother in law is of no force, and is merged in and obliterated by the marriage, her subsequent refusal to keep such agreement, and desire that she and her husband establish a home of their own, they having the ability so to do, is not desertion on her part: *Allee v. Allee*, 43 Ill. App. 370. A wife is not bound to abandon her home, means of support and children by a former marriage, and join her husband in another place, it not appearing that he is engaged in any business, or that he has provided a home for her therein, and her refusal to do so constitutes no ground for divorce on the plea of her desertion: *Phelan v. Phelan*, 35 Ill. App. 511. If husband and wife have lived for years in a suitable home belonging to her, among her friends, and his choice of a different home is not made in good faith, and his offer of another suitable home elsewhere is not made until after her cause of action against him for desertion has become perfected, he cannot charge his wife with desertion in refusing to accompany him to his new home: *Vosburg v. Vosburg*, 136 Cal. 195, 68 Pac. 694.

1. **Separation Pending Suit.**—There can be no desertion during the pendency of divorce proceedings, as it is presumed that no return would be permitted: *Haltenhof v. Haltenhof*, 44 Ill. App. 135. A voluntary separation of a wife from her husband while proceedings for divorce brought by her are pending in good faith does not constitute such willful desertion as will authorize a divorce there-

for to the husband: *Palmer v. Palmer*, 36 Fla. 385, 18 South. 720; *Porritt v. Porritt*, 18 Mich. 420. The separation of a husband from his wife during the pendency of a suit for divorce does not constitute a desertion: *Doyle v. Doyle*, 26 Mo. 545. Where a husband commences divorce proceedings on the ground of indignities perpetrated by his wife, and such proceedings are dismissed, and proceedings afterward commenced by him on the ground of desertion, the time during which the first divorce suit was pending cannot be counted as part of the period of desertion, as the position of absence was forced upon the wife during the pendency of the first divorce suit, and constitutes no ground for divorce: *Salorgne v. Salorgne*, 6 Mo. App. 603. The voluntary separation by a wife from her husband pending a suit against her for divorce on the ground of her adultery does not constitute willful desertion during that period: *Marsh v. Marsh*, 14 N. J. Eq. 315, 82 Am. Dec. 251. A wife who is prosecuting an action against her husband for divorce for alleged adultery cannot maintain that the separation, pending such suit, is desertion on the part of her husband: *Chipchase v. Chipchase*, 48 N. J. Eq. 549, 26 Atl. 468. It has also been decided, however, that after the separation, an action for maintenance begun by the wife, who is in the wrong, can have no effect upon the running of the statutory period, necessary to make her desertion a cause for divorce: *Kusel v. Kusel*, 147 Cal. 52, 81 Pac. 297.

j. **Imprisonment or Involuntary Absence.**—Imprisonment of husband or wife may constitute desertion. Thus, if a husband is serving a life sentence in a state penitentiary, his wife will not be denied a divorce for his desertion upon the ground that the living apart is not voluntary, as the separation is not without fault on his part: *Davis v. Davis*, 102 Ky. 440, 43 S. W. 168; and a divorce for willful desertion for five years may be decreed, although the guilty party has been in the house of correction during the greater part of that time, under successive sentences, beginning a few months after the desertion, and with very short intervals between the terms of imprisonment: *Hews v. Hews*, 7 Gray, 279. But it has also been decided that the facts that a husband abuses his wife and then shoots her, is arrested and convicted, and sentenced to state prison and confined therein, do not constitute a willful and obstinate desertion, entitling her to a divorce: *Wolf v. Wolf*, 38 N. J. Eq. 128. And that, if a wife is held for trial for a year, under a charge preferred by her husband, of an attempt to take his life by poison, and is acquitted, her absence from her husband for the year does not constitute desertion on her part: *Porritt v. Porritt*, 18 Mich. 420. The insanity of a wife and her confinement in an asylum for lunatics by the consent and direction of her husband is not her desertion of him: *Pile v. Pile*, 94 Ky. 308, 22 S. W. 215.

HALL v. KARY.

[133 Iowa, 465, 110 N. W. 930.]

PLEADINGS—Cancellation of Instruments.—In an action to cancel and set aside a pretended conveyance, the granting of which relief does not involve any allowance of damages, all allegations relating to damages are properly stricken from the petition, where the facts pleaded do not entitle plaintiff to damages in case cancellation is decreed, and there are no allegations on which damages by way of alternative relief can be awarded in case the cancellation is denied. (pp. 639, 640.)

APPEAL.—Error in Rulings on Admission of Evidence, not pointed out by counsel will not be reviewed on appeal. (p. 640.)

APPEAL.—Striking Out of Pleadings after the testimony is closed is within the discretion of the trial court, and if without prejudice, its action will not be disturbed on appeal. (p. 640.)

DEEDS—Delivery with Name of Grantee in Blank.—A deed left blank as to the grantee, but otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance with authority to insert the name. (p. 641.)

DEEDS—Delivery with Name of Grantee in Blank—Good Faith Purchaser.—One who, for full consideration and without notice of fraud, takes a conveyance of property by delivery of a deed executed and delivered to his grantor by a prior owner and blank as to name of the grantee, becomes a purchaser without notice as effectually as though his grantor had executed a direct conveyance. (p. 642.)

C. E. Hunn, for the appellant.

Bowen, Brockett & Weldy, for the appellees.

⁴⁶⁶ **McCLAIN, C. J.** Although this action was tried below in equity, and the case is therefore triable here de novo, the appellant relies upon errors of law as well as upon the claim that a different result should have been reached on the merits.

⁴⁶⁷ The errors of law relied upon will be first briefly considered. It is claimed that the court erred in striking from the petition the allegations as to damages. But the action was to cancel and set aside a pretended conveyance, and the granting of this relief did not involve any allowance of damages. No facts being alleged entitling plaintiff to relief by way of damages if he should succeed in securing the relief by way of cancellation which is prayed for, and no allegations on which damages by way of alternative relief, in the event that cancellation was not awarded, being made, the court

properly struck all the allegations relating to damages from the petition.

Error is assigned in sustaining objections to questions asked of witnesses by plaintiff's counsel, and overruling objections interposed by plaintiff's counsel to question asked in behalf of defendant; but, as counsel does not point out in what respect the court erred in the ruling referred to, there is nothing for us to consider under this assignment.

There is no merit in appellant's complaint that the court erred in overruling a motion to strike defendant's answer and cross-petition filed after the evidence had been taken, and the testimony closed. This was a matter resting in the discretion of the court, and it does not appear in any way that its discretion was abused or that any prejudice resulted to appellant. If plaintiff was not entitled to have the conveyance to the defendant Mrs. Kary set aside, then the decree dismissing plaintiff's petition would effectually cut off any right which plaintiff might have in the property as against such defendant, and plaintiff is not deprived of any substantial rights by the entry of a decree quieting the title in said defendant as against the plaintiff.

With respect to the merits of the case made in plaintiff's petition, it is the contention of appellant that the evidence ⁴⁶⁸ showed him to be entitled to the cancellation of a deed to his homestead which, as he claims, was never signed by him and his wife, and which, as he further claims, if executed by them, was blank as to grantee, and delivered to Chamberlain, one of the defendants, in an exchange of property made with said Chamberlain, and the name of defendant Mrs. Kary inserted therein without plaintiff's authority. It is also claimed that the deed, if executed and delivered, was without substantial consideration, and procured by false and fraudulent representations on the part of said Chamberlain, and by collusion and conspiracy between said Chamberlain and defendant, Mrs. Kary, and her husband. The deed of plaintiff and his wife to the property in controversy was attached as an exhibit to plaintiff's petition, and their signatures thereto were admitted in their testimony to be genuine, and we think plaintiff has wholly failed to make out his claim that these signatures were written on a blank piece of paper which was afterward, without their authority, converted into an instrument in point and writing purporting to be a deed. It appears beyond controversy that plaintiff left the instrument

which had been thus executed by him and his wife with Chamberlain, and accepted and retained possession of a conveyance of property in exchange for that in question; and it must be presumed that, although plaintiff's deed was blank as to grantee, the intention was to vest Chamberlain with title to the property described therein, and authorize him to insert the name of a grantee as he should see fit. That a deed thus left blank as to the grantee, being otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance is well settled in this state: *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Logan v. Miller*, 106 Iowa, 511, 76 N. W. 1005; *McClain v. McClain*, 52 Iowa, 272, 3 N. W. 60; *McCleery v. Wakefield*, 76 Iowa, 529, 41 N. W. 210, 2 L. R. A. 529.

The only contention in argument with reference to want ⁴⁶⁹ of consideration is that the conveyance of the land taken in exchange was by deed of the owner thereof, blank as to grantee, delivered by Chamberlain to plaintiff. But what has just been said as to the effect of such a deed disposes of this question. There is no contention that the law of Missouri as to the effect of a deed blank as to grantee is different from that of this state. There was therefore a sufficient consideration for the conveyance which plaintiff is seeking to have set aside. The fraud relied upon by plaintiff as a ground for setting aside his deed consisted, as it is alleged, of false representations made by Chamberlain to him with reference to the character of the Missouri land which was taken in exchange. There is a square conflict in the evidence as to such alleged misrepresentation, and, as the trial judge had the witnesses before him, he was in a better position to pass upon the credibility of the witnesses than we are, and we might safely predicate our affirmance of the decree on the ground that the fraud relied upon is not made out by such clear and satisfactory evidence as would justify the exercise of the equitable power to set aside plaintiff's deed.

But there is another consideration which, as it seems to us, is conclusive as against plaintiff's right to a rescission so far as it would affect the title of the defendant, Mrs. Kary. The transaction, by which plaintiff's property, conveyed to Chamberlain by the blank deed, was sold and transferred to Mrs. Kary by the insertion of her name in such deed as

grantee was subsequent to the execution and delivery of the deed from plaintiff to Chamberlain. The evidence does not in any way connect Mrs. Kary with any fraud in the transaction between plaintiff and Chamberlain. Mrs. Kary paid to Chamberlain a full consideration for the property, one hundred dollars in cash, and one hundred dollars by note and mortgage to Chamberlain's wife, given at his direction. Mrs. Kary thereby became the purchaser for value without notice of any fraud affecting the conveyance from plaintiff to Chamberlain, and she affirmatively ⁴⁷⁰ shows that she was a purchaser in good faith and without notice. That one who takes a conveyance of property by delivery of a deed executed and delivered to his grantor by a prior owner and blank as to the name of the grantee becomes a purchaser without notice as effectually as though his grantor had executed a direct conveyance is established by our cases: See, especially, *McCleery v. Wakefield*, 76 Iowa, 529, 41 N. W. 210, 2 L. R. A. 529. There is no question in this case but that Mrs. Kary is a good faith purchaser for value. She does not simply stand in the shoes of Chamberlain, entitled to reimbursement for the amount she has paid for the property, but she is entitled to the property itself as against any right of the plaintiff to rescission of his conveyance to Chamberlain, on account of fraud in that transaction.

The decree of the trial court is affirmed.

When a Deed is Executed and acknowledged by the grantor, with a blank left therein for the name of the grantee, the grantor may, by parol, authorize a third person to insert the name of the grantee, and when so filled out and delivered, it becomes a valid deed: *Cribben v. Deal*, 21 Or. 211, 28 Am. St. Rep. 746.

TAFT COMPANY v. AMERICAN EXPRESS COMPANY.

[133 Iowa, 522, 110 N. W. 897.]

CARRIERS—Negligence—Burden of Proof.—In an action against a common carrier to recover for negligence in transporting perishable property in refrigerator-cars, the negligence alleged as consisting in a failure to properly ice the cars, the burden of proof is upon the plaintiff to show such negligence, and that the property was in good condition when delivered to the carrier. (pp. 643, 644.)

CARRIERS—Transportation of Perishable Property—Negligence.—If a common carrier undertakes to carry perishable commodi-

ties in refrigerator-cars, it should provide a supply of ice ample for the purpose, not only at the point of shipment, but also at such places along its lines, as will reasonably insure a safe transit to the point of destination, and failing to do this the carrier is guilty of negligence. (p. 645.)

Berryhill & Henry, for the appellant.

Miller & Wallingford, for the appellee.

523 BISHOP, J. On the evening of May 25, 1903, plaintiff delivered to defendant at Anna, Illinois, four hundred and eighty crates of strawberries for shipment to Des Moines, this state. Defendant furnished for the purpose a refrigerator-car, and the crates of berries were placed therein by its direction. That it was intended and expected that the car should be properly supplied with ice by defendant before being started on its journey, and that it should in like manner be re-iced en route as might be required, is not the subject of dispute. It is the claim of plaintiff that, although the berries were fresh, sound and in good shipable condition at the time of the loading at Anna, when the car arrived in Des Moines on the morning of May 27th, and on being opened, it was found that the berries were wholly spoiled and valueless. The negligence alleged is in failing to properly ice the car before being started and while en route. Defendant, in answer, admits the receipt by it as a common carrier of the berries; denies that such berries were in good shipable condition; and denies negligence in respect of the icing of the car. On coming in of the verdict the defendant filed a motion for judgment non obstante, on the ground that the evidence was insufficient to make out a case of negligence; also, and subject thereto, a motion for new trial on the same ground. Both motions were overruled, and this appeal followed the entry of judgment on the verdict.

524 It thus becomes apparent that we have for determination but the question of the sufficiency of the evidence to warrant a finding for negligence. The plaintiff assumed the burden of proof, as under the allegations of its petition it was bound to do: *Denton v. Railway*, 52 Iowa, 161. And as the charge of the court is not set out in the record, we shall assume that the jury was so instructed. Accordingly, it was incumbent on plaintiff to establish by a preponderance of the evidence these several fact conditions: 1. That the berries were shipable when delivered to the defendant; 2. That there

was a failure on the part of defendant to properly ice the car; 3. That the condition of the berries when the car reached Des Moines was due to such failure to ice. There is some dispute in the evidence as to the condition of the berries when shipped. But the evidence for plaintiff tended to show that the shipment was in the evening, and that the fruit had been picked during the day; that it was in good condition, and not overripe, and was properly packed. So far, therefore, a finding in favor of plaintiff was warranted.

The car was arranged for refrigeration purposes by four ice bunkers, two at each end. The bunkers were loaded from the top of the car through trapdoors, and each would hold from twelve hundred to fifteen hundred pounds of ice. The trapdoors were intended to be air-tight when closed. There was evidence for plaintiff tending to show that, when the car left Anna, the ice bunkers were not over half full, that the attention of defendant's agent was directed to the situation, and that, on being told that the car ought to be re-iced before leaving, he responded that there was not time, and that he would have it re-iced at Centralia, thirty miles away. The car was routed via Chicago, and arrived in Des Moines about twelve hours late, due, it is conceded, to matters connected with railway operation, and not the fault of defendant, or constituting negligence on its part.

525 Witnesses for plaintiff testified that, when the car arrived in Des Moines, there was no ice in two of the bunkers, and but little in the remaining two; further, when the car was opened, the air inside was found to be warmer than that outside. The weather at Anna was clear and pleasant, but it had been raining throughout the state of Iowa for several days. The further evidence for plaintiff was to the effect that, where a car was properly iced in Chicago at noon (the time when the bunkers were filled as testified to on behalf of defendant), there should not be a loss of ice to exceed twenty-five per cent, upon arrival of the car in Des Moines the next morning, and that the humidity of the atmosphere outside would have no appreciable effect, as refrigerator-cars are supposed to be air-tight.

The evidence introduced by defendant was to the effect that the car was iced to its full capacity just before leaving Anna; and that the bunkers were inspected just before noon the next day in Chicago, and the ice replenished; two thousand pounds being used, which filled each bunker to its full

capacity. There was also evidence to the effect that refrigeration is affected by damp weather. Such is the fact situation as presented by the evidence in the record. Now, the defendant knew the character of the shipment, and, upon receipt, it became its duty to exercise the care and diligence necessary to protect it. "A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated": *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800, 7 L. R. A. 280.

Where, therefore, a carrier undertakes to carry perishable commodities in refrigerator-cars, it is its duty to provide ⁵²⁶ a supply of ice ample for the purpose—not merely at the point of shipment, but at such places along its lines as will reasonably insure a safe transit to the point of destination. The refrigeration must be continuous, and nothing will serve to excuse except an act of God, which could not be foreseen or guarded against. Neither damp weather nor the delays ordinarily incident to railway traffic fall under that head. This is the law, and we must assume that the court so instructed the jury. Being guided thereby, the jury had ample warrant to find the defendant negligent. To begin with, in view of the other evidence before them, they were not bound to believe that the car was iced to its capacity either at Anna or in Chicago; but, conceding that the bunkers were filled at each of those points, the fact remains that the car came into Des Moines with its bunkers empty, or practically so. Now, it might well be assumed that defendant knew that a supply of ice put in at Chicago would not last through to Des Moines. If, therefore, it had icing stations along the route traveled and failed to supply the car as needed, it was negligent; if it did not have the icing stations, it was negligent.

A further finding that the destruction of the berries was due to a lack of refrigeration was not only warranted, but could not well have been avoided. For the plaintiff, there was evidence to the effect that, with proper care, the fruit

would have been in merchantable condition upon reaching Des Moines, and this, even though the time consumed in transit had been tripled. This evidence stands in the record undisputed.

We conclude that the motion for new trial was rightly denied, and the ruling and judgment is affirmed.

For Authorities in Support of the Principal Case, see St. Louis etc. Ry. Co. v. Renfro, 82 Ark. 143, 118 Am. St. Rep. 58; New York etc. R. R. Co. v. Cromwell, 98 Va. 227, 81 Am. St. Rep. 722.

WILSON v. LOUISIANA PURCHASE EXPOSITION COMMISSION.

[133 Iowa, 586, 110 N. W. 1045.]

MANDAMUS—Action Against State or Its Agents.—A state cannot be sued without its consent. A litigant cannot evade this rule by bringing an action in mandamus against the servants or agents of the state to enforce satisfaction for a claim payable out of state funds. (p. 647.)

MANDAMUS—Action Against State or Agents.—A state cannot be sued without its consent, and a writ of mandamus will not issue to compel state officers or agents to do an act involving discretionary or judicial determination of the question involved. (p. 647.)

MANDAMUS will not Issue to compel the state to execute a contract made by it. (p. 648.)

MANDAMUS will not Lie to compel the allowance of a rejected or disputed claim against the state. (p. 648.)

Mandamus to compel the defendant to pay to plaintiff the sum of two hundred dollars, which he claims to be due him from the state of Iowa under a contract made with the defendant commission. Such claim was rejected by the commission. At the trial, plaintiff demanded a jury, and that being denied him, he duly excepted. After trial judgment was rendered dismissing plaintiff's petition, and he appealed.

Allen & Lingenfelter, for the appellant.

C. W. Mullan, attorney general, for the appellee.

588 SHERWIN, J. The appellant makes but one point in his brief and argument of this case, which is that the court

erred in refusing to submit the issues involved to a jury for determination. On the other hand, the appellees contend that the suit cannot be maintained, because it is in effect a suit against the state, and because the state has never consented thereto. We think it must be conceded that, under the allegation of the petition, the defendants in this case are nominal only. The Louisiana Purchase Exposition Commission was a creature of the state, created for the specific purpose of representing the state and its interests at the exposition bearing its name. All expenses incurred by it in the execution of its delegated powers were payable from the funds of the state set apart by legislative authority for that express purpose. The commission was clearly but an agent of the state through whom the public funds were to be disbursed, and this disbursement was authorized by law only upon the exercise of the discretion and judgment of the commission. While the state is not named as a party in the action, it is quite clear to us that it is in fact the actual party in interest. If the writ prayed for were to be issued, it would compel the defendant to make a draft upon state funds; in other words, the effect thereof would be to compel the state itself to pay the plaintiff's claim, which is an unliquidated demand for which no specific provision has been made from state funds. It is fundamental that a state cannot be sued in its own courts without its consent, and it is a further rule that a litigant will not be permitted to evade the general rule by bringing action against the servants or agents of the state to enforce satisfaction for claims: *Cunningham v. Macon etc. R. R. Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, 27 L. ed. 992; *In re Ayres*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216; *Aplin v. Board of Supervisors of Grand Traverse County*, 73 Mich. 182, 16 Am. St. Rep. 576, 41 N. W. 223; *People v. Dulaney*, 96 Ill. 503; *Commonwealth v. Wickersham*, 90 Pa. 311; *Weston v. Dane*, 51 Me. 461.

Under the rule that a state cannot be sued in its own courts without its consent, it necessarily follows that a writ of mandamus will not ordinarily issue to compel state officers or agents to do an act involving discretionary or judicial determination of the question. Nor will such writ issue to compel the state to execute a contract made by it. Nor will the writ issue to compel the allowance of a rejected or disputed claim: *Payne v. Board of Wagonroad Commission-*

ers, 4 Idaho, 384, 39 Pac. 548; State v. Merrell, 43 Neb. 575, 61 N. W. 754; State v. Commissioners, 26 Ohio St. 364. It is made to appear from the allegations of the petition herein that the plaintiff's claim for services was to be audited and allowed before a voucher was issued therefor by the executive committee of the defendant; and, under the rule of the cases heretofore cited, and many others which might be cited, a writ of mandamus will not issue to compel an officer or tribunal to do an act involving discretionary or judicial determination. This branch of the case has not been argued by the appellant, and we need give it no further consideration. For the reasons thus briefly stated, there was no error in dismissing the plaintiff's petition, and we need not determine whether the plaintiff was entitled to a trial by a jury, if the court had jurisdiction of the case.

Affirmed.

The Rule that a State cannot be Sued without its consent cannot be evaded by suing its officers: See the note to Sanders v. Saxton, 108 Am. St. Rep. 830.

Mandamus Against Public Officers is the subject of a note to State v. Gardner, 98 Am. St. Rep. 863.

MONTGOMERY v. ALDEN.

[133 Iowa, 675, 108 N. W. 234.]

JUDGMENTS—Res Judicata—Search-warrant Proceedings— If rival claimants to a search-warrant proceeding appear, employ counsel, and submit the issue of ownership upon evidence produced pro and con, the finding of the magistrate is conclusive until reversed, and amounts to an adjudication, although, strictly speaking, such claimants are not parties to the action. (pp. 648, 649.)

O. Lovejoy and J. A. Henderson, for the appellants.

Howard & Howard, for the appellees.

676 DEEMER, J. It is agreed by counsel that the only question for our determination arises upon the plea of former adjudication. It appears without controversy that plaintiffs herein caused a search-warrant to be issued out of the office of a justice of the peace for the identical animals involved in this controversy; that the hogs were seized un-

der the writ, and that defendants herein appeared before the justice and made claim to the animals as their property; that plaintiffs appeared in the proceedings, employed counsel to represent them, and gave testimony to the effect that they owned the hogs. Defendants also testified in that proceeding that they owned them, and the justice, after hearing all the evidence, found that plaintiffs were not the owners of the property, and he ordered its return to defendants from whom it had been taken. No appeal was taken from this finding: but thereafter plaintiffs commenced this action to recover the possession of the animals upon the ground that they were the owners and entitled to the possession thereof.

We may assume that ordinarily a finding in a search-warrant proceeding is not conclusive as to the ownership of the property; but where rival claimants appear, employ counsel, and submit the issue of ownership upon testimony adduced pro and con, the finding is conclusive, although, strictly speaking, they are not parties to the action. This is squarely decided in *Haworth v. Newell*, 102 Iowa, 451, 71 N. W. 404. Indeed, one may be bound without being a party to proceedings: *Marsh v. Smith*, 73 Iowa, 295, 34 N. W. 866; *Baxter v. Myers*, 85 Iowa, 328, 39 Am. St. Rep. 298, 52 N. W. 234; *Stoddard v. Thompson*, 31 Iowa, 80. But appellants' counsel insist that, while the finding in a search-warrant proceeding may be conclusive upon one who was properly a party thereto as a defendant, or as the person from whom the property was taken, it is not binding upon the person who caused the warrant to be issued, even though he appears and claims to own the property, and tries the issue as to ownership. This, of course, cannot be true, and is no ground for distinguishing the *Haworth* case. As ⁶⁷⁷ a rule, estoppels by judgment must be mutual, and if a finding against the defendants in the search-warrant proceeding would have been conclusive against them, it must be true that a finding in their favor is equally conclusive. While plaintiffs were not, strictly speaking, parties to the search-warrant proceeding, they, as owners of the property taken under the warrant, might properly appear in the proceeding and make proof of their ownership: Code, sec. 5563. Upon such appearance, the issue as to ownership of the property was or might have been involved, and under the doctrine of the *Haworth* case (102 Iowa, 451, 71 N. W. 404), the finding on such issue is conclusive. There is nothing to distinguish this case from

that, and, following the rule there announced, we must sustain the trial court in its ruling on the motion to direct a verdict for the defendants.

The judgment is right, and it is affirmed.

Judgment is Conclusive upon the parties and those in privity with them: *Schuler v. Ford*, 10 Idaho, 739, 109 Am. St. Rep. 233; *Chicago etc. R. R. Co. v. Cass County*, 72 Neb. 489, 117 Am. St. Rep. 806. And the term "parties" includes all those who are directly interested in the subject matter of the suit, knew of its pendency, and had the right to control and direct or defend it: *Courtney v. Knabe & Co.*, 97 Md. 499, 99 Am. St. Rep. 456. Compare *Cope v. Payne*, 111 Tenn. 128, 102 Am. St. Rep. 746.

BAY v. DAVIDSON.

[133 Iowa, 688, 111 N. W. 25.]

MUNICIPAL CORPORATIONS—Contracts with City Officers—Construction of Statute.—A contract for the sale of merchandise to a city by a member of its council is not within a statute prohibiting a member of a city council from being or becoming interested in any contract or job for work, or the profits thereof, or services to be performed for the city. (p. 651.)

MUNICIPAL CORPORATIONS—Contracts with City Officers. A contract for the sale of merchandise to a city by a member of its council is void, as violative of the law of agency, and contrary to public policy, although the city receives the benefits of the contract. (pp. 651, 652.)

C. W. Hoffman and M. L. Temple, for the appellants.

V. R. McGinniss and M. Woodard, for the appellees.

689 BISHOP, J. The plaintiffs are residents and taxpayers of the town of Grand River, in Decatur county. The defendants are, respectively, the mayor and members of the town council of said town, among whom is defendant Wood Binning, who alone appeared and answered. It is alleged in the petition that said defendant Binning is a merchant in said town, and that during the year 1903 he sold and delivered to and for the use of the town certain lumber, paints and oil, and machinery which were used by the town in constructing and repairing sidewalks, mowing weeds, etc. The

prayer is for an injunction restraining payment therefor. The answer admits the sale of the merchandise, and alleges that the sale was upon open market, in good faith, and for the reasonable value; that at the time there were but two merchants in and proximate to the town from whom such merchandise could be purchased, viz., the answering defendant, and one Griffin; the latter also a member of the town council. In addition, said defendant alleges that the fact of his furnishing lumber, etc., for sidewalks, crossings, etc., was well known to plaintiffs and the other residents and taxpayers of said town, and that no objection was ever made thereto; that accordingly plaintiffs are estopped. The answer was met by a general demurrer, and, upon being submitted, the demurrer was sustained. Defendant electing to stand on ~~600~~ his answer, and the ruling on the demurrer, decree was entered as prayed in the petition.

In our opinion the ruling upon the demurrer was correct and the decree entered should be sustained. Plaintiff's principal reliance was upon the provisions of Code, section 668, subdivision 14, which provides that no members of any council shall be interested, directly or indirectly, in any contract or job for work, or the profits thereof, or services to be performed for the corporation. And it is the argument in this court, as it was in the court below, that the statutory prohibition by fair intendment includes sales of merchandise to the town by a member of council. The trial court declined to adopt this view, but held that such contracts of sale must be held void in virtue of the common law. We agree that such contracts are not within the statute. The prohibition has relation to "contracts or jobs for work." It is plain that the expression "contract or job" is to be construed in the conjunctive. What was intended was to forbid in connection with municipal work the employment by the council of one of its own members. And this is rendered more probable when we consider that, as held by the court below, contracts such as are here in question are not only prohibited by statute, but by general law. The compensation to be paid a councilman is fixed by Code, section 669, and it is exclusive of any other. It cannot be increased either by direct payment or indirectly through the medium of profits on sales of goods. As pertinently said in *Council Bluffs v. Waterman*, 86 Iowa, 688, 53 N. W. 289, if an officer feels that he is not properly compensated for the services

required of him, there is no law to prevent him from resigning. The following cases are also in point: *Fawcett v. Woodbury County*, 55 Iowa, 154, 7 N. W. 483; *Moore v. District of Toledo*, 55 Iowa, 654, 8 N. W. 631; *Moore v. County*, 61 Iowa, 177; *Adams County v. Hunter*, 78 Iowa, 328, 43 N. W. 208, 6 L. R. A. 615; *Massie v. Harrison County*, 129 Iowa, 277, 105 N. W. 507.

Now, by general law contracts of sale as here shown cannot be upheld because they are not only violative of the ⁶⁹¹ fundamental law of agency, but are contrary to public policy. The defendant Binning was an officer and agent of the town, and the duty and obligation which the law cast upon him in such relation forbade him from acting in any transaction for himself as an individual on the one part, and as an officer and agent of the town on the other part. And it can make no difference that in the particular transaction he refrained from voting for the purchase of goods as made. It was his duty to vote, and he could not reap an advantage by avoiding that duty. As said by Judge Dillon in his work on *Municipal Corporations*, section 444: "It is a well-established and salutary rule in equity that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend upon reason technical in character, and is not local in its application. It is based upon principles of reason, of morality and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails. One who has power, owing to the frailty of human nature, will be too readily seized with the inclination to use the opportunity for securing his own interest at the expense of that for which he is intrusted. . . . The law will in no case permit persons who have undertaken a character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others": See, also, *People v. Township Board*, 11 Mich. 222; *City of Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242; *Smith v. City of Albany*, 61 N. Y. 444.

In the case last cited it appeared that a committee of the city of Albany, having in charge a celebration, had hired

carriages of Smith, a member of the council, and he sought to recover compensation from the city therefor. In refusing ⁶⁹² to recognize his claim the court said: "The council of the city were the agents of the city, and, while holding their relation to it, each member of that body was under such an obligation of absolute loyalty to the interests of the city, as prohibited him from entering into any arrangement with his associates by which his individual interests could come in conflict with the interests of his constituents, who are entitled exclusively to such an exercise of his caution and judgment in their behalf as an ordinarily prudent man would exercise in his own business." We cannot better conclude our own thought on the subject than by quoting from an opinion handed down by the learned trial judge at the time of entering the decree here appealed from. After referring to the principle of the agency, he said: "Applying that principle to the case at bar, and the sales of merchandise by Wood Binning as an individual to Wood Binning as the agent of the town of Grand River for the use of the town must be held invalid. Wood Binning has accepted the duty and obligation of an agent or trustee for the town of Grand River. As such agent, he owed his principal the utmost good faith in the performance of his duties. As such agent, it was his duty to purchase material for the town of as good quality and for as low a price as it was possible to procure. But if he himself became the seller, it was his interest to sell such articles as he had notwithstanding their quality and for the highest price he could obtain. His duty to the town and his private interests thus became directly antagonistic. It matters not if he did in fact make his private interests subservient to his public duties. It is the relation that the law condemns, not the results. It might be that in this individual case public duty triumphed in the struggle with private interests, but such might not be the case again or with another officer, and the law will not increase the temptation nor multiply opportunities for malfeasance. Neither will it take the trouble to determine whether in any case the result shows a wrong or crime, but it absolutely and unequivocally refuses its sanction to any contract of any kind whatever where such relation exists."

⁶⁹³ That contracts such as are here complained of are against public policy is plainly manifest. The courts of the country, including this court, have repeatedly made pro-

nouncement to that effect. And it is fundamental doctrine that a contract which is violative of public policy is void and will not be enforced: *Guenther v. Dewien*, 11 Iowa, 133; *Merrill v. Packer*, 80 Iowa, 542, 45 N. W. 1076; *Greenhold on Public Policy*, 335. Thus, in *Weitz v. Independent District*, 78 Iowa, 37, 42 N. W. 577, it appeared that the board of the defendant district had employed one of its own members to superintend the construction of a schoolhouse, and we held that the contract was void. The opinion there was put squarely upon the doctrine that it would be most unwise and against public policy to permit a board of directors to contract with one of its members in the name of the district. And it was said that such an agreement would in fact be between a portion of the members of the board on the one side, and a director as contractor on the other, and the contract might be determined by his own voice. Such a practice would give opportunity for the grossest fraud. Secret understandings might be entered into between a majority of the members of the board by virtue of which different contracts might be parceled among them to the prejudice of the district: See, also, *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393; *Gleason v. Railway (Iowa)*, 43 N. W. 517; *Macy v. Duluth*, 68 Minn. 452, 71 N. W. 687; *Brown v. First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 211; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 57 Pac. 777, 45 L. R. A. 420.

That the town has received the benefits of the contract is not material. This court is committed to the doctrine that the contract being invalid it cannot be rendered valid so as to support an action for recovery by invoking the doctrine of estoppel: See the cases above cited. Such is also the rule in most other jurisdictions: 15 Am. & Eng. Ency. of Law, p. 999, and cases cited in notes. But counsel for appellant say that the common-law rule as to such contracts is no longer ⁶⁹⁴ in force in this state, and this in virtue of the statutes forbidding contracts, etc., for work. It is the argument on this point that as the law-making power has seen fit to legislate upon the subject, and by specific enactment put restraint only upon such contracts as have in view the performance of service or work, this must be accepted as accomplishing an abrogation of the common-law rule, as related to all other contracts, between a municipality and one of its officers. This position is wholly untenable. It would seem that coun-

sel have in mind the maxim "Expressio unius est exclusio alterius" (the naming of one person or thing is an exclusion of the other). Reflection will make it clear that the maxim cannot be given application to work a result as here contended for. We have already said in this opinion that contracts of the character here in question are not included in the statute, and this, because the statute refers only to contracts for service or labor. And, in so holding, we have in a sense made application of the maxim above quoted. And, as we have seen, the decree was not predicated upon the statute, and there is no authority, as there can be no reason, for invoking the maxim to give validity to a contract void at common law as against public policy simply because it does not fall within the provisions of the statute. Both contracts for service and contracts of sale are prohibited at common law. The legislature has done nothing more than to emphasize the prohibition as to service contracts. And, in our opinion, it would be absurd to give effect to the statute as evidencing at once a change of view respecting the matter of public policy, and as a declaration for the legality of all contracts heretofore within the class prohibited at common law save those in such statute prohibited in terms.

The decree was right, and it is affirmed.

For Authorities in support of the decision in the principal case, see *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31; *Land etc. Lumber Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

IDEAL MANUFACTURING COMPANY v. LUDWIG.

[149 Mich. 133, 112 N. W. 723.]

TRADE UNIONS—Contempt—Violation of Injunction.—If an injunction is granted restraining the members of a trade union from intimidating, or unlawfully interfering with, the employés of a certain company against whom a strike is on, such injunction is violated by the president of such union saying to a workman, as he was being escorted through a crowd by a policeman, “I see you are still doing your dirty work,” and such act renders such president guilty of a contempt of court. (p. 658.)

Dohany & Dohany, for the respondents.

G. F. Monaghan and P. J. Monaghan, for the complainant.

133 GRANT, J. Bill by the Ideal Manufacturing Company against Martin Ludwig and others to enjoin an interference with complainant’s business. On petition, Martin Ludwig was adjudged guilty of contempt in violating the temporary injunction, and sentenced to imprisonment for ten days in the county jail. Affirmed.

The respondent was found guilty of contempt of court in violating the injunction which the court had issued in the case of the Ideal Mfg. Co. v. Martin Ludwig and others. The injunction restrained the respondent and others from:

“1. In any manner unlawfully interfering with the employés of the Ideal Manufacturing Company, complainant herein, now in the employ of complainant, and from in any unlawful manner interfering with any person who may desire to enter the employ of the Ideal Manufacturing Company, by the use of threats, intimidation, personal violence, or other unlawful means calculated or intended to deter or prevent such person or persons **134** from entering or continuing in the

employment of the Ideal Manufacturing Company, or calculated or intended to induce any such person or persons into leaving the employ of the said Ideal Manufacturing Company.

“2. From congregating, gathering, assembling, lingering, or loitering about or in the neighborhood of the premises upon which the Ideal Manufacturing Company is engaged in carrying on its business, or at other places, with intent to unlawfully interfere with the employés of the said Ideal Manufacturing Company, or with the prosecution of their work, or to unlawfully interfere with or intimidate or threaten the employés of the Ideal Manufacturing Company, with intent to cause them to leave the employment of said company, or to interfere with or obstruct in any unlawful manner, the business and trade of said Ideal Manufacturing Company.

“3. From interfering with the free access of the employés of the said Ideal Manufacturing Company to the premises on which the company is engaged in carrying on and conducting its business in their places of work, and likewise from interfering with the free return of the said employés to their homes or places of business.

“4. From giving any directions or orders, through associations, committees, or otherwise, for the performance of any such unlawful acts or threats or acts of intimidation hereinbefore enjoined, and from in any unlawful manner, whatever, impeding, obstructing, or interfering with the regular operation and conduct of the business of said Ideal Manufacturing Company.

“5. From interfering, intimidating, boycotting by the distribution of circulars or otherwise, or otherwise molesting or threatening in any manner the employés or patrons of the said Ideal Manufacturing Company, or any other person or persons, for the purpose, by means of such interference, intimidation, threats, or boycotting, of inducing such person or persons not to do business or deal with or transact business with said Ideal Manufacturing Company.

“6. From the performance of any acts, threats, or acts of intimidation hereinbefore enjoined, and from obstructing or interfering, by boycotting or otherwise, or by any acts of intimidation or coercion, with the regular conduct and operation of the business of the said Ideal Manufacturing Company, and from preventing by these means said company from carrying on its business, until the further order of this court.”

¹³⁵ The facts in this case are very similar to those in *Beck v. Railway T. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407.

The complainant is carrying on a large manufacturing establishment, employing from three hundred to three hundred and fifty men. Among its workmen are those known as "metal polishers." There is a union known as "Metal Polishers' Union No. 1," of which respondent Ludwig was president. This union demanded of their employer that it discharge a workman because he did not belong to the labor union. In other words, complainant claimed the right to employ its workmen without dictation from any union or other association. The labor unions claimed the right to dictate whom the complainant should employ. Complainant refused to comply with the demand, and a strike was ordered by the unions. Pickets were established in the streets around the complainant's manufactory, crowds of union men, to the number sometimes of three hundred, gathered in the streets, particularly at morning, noon, and night, to intercept and intimidate the complainant's employes, and threats of boycott, etc., were made. To such an extent was this unlawful interference carried on by the union men that twenty policemen were required to protect complainant's employes in going to and from their work. Complainant filed a petition against Ludwig and others, charging contempt of court. They were duly served with the petition and affidavits accompanying it, and with an order to show cause. They appeared, proofs were taken, and the respondent found guilty.

Ludwig and other members of the Metal Polishers' Union followed an employe of the complainant as he was being escorted by a policeman through a crowd. Ludwig walked in front of this employe and said to him, "I see you are still doing your dirty work." When the officer ¹³⁶ asked him who he meant, he pointed to the employe, and said, "I mean that." Further statement of the facts is unimportant. It is manifest that the attitude of the crowd, composed of union men, was hostile, threatening and intended to intimidate. The claim of Ludwig and his associates that they were seeking only persuasion is the baldest subterfuge. The circuit judges of the court below who heard the testimony very properly said:

"It was a perversion of terms to claim, or to believe, that to approach a man surrounded by an unfriendly and menacing

crowd and ask him to do or to refrain from doing something is lawful or peaceable persuasion, or is other than an act of intimidation as is specifically and in terms enjoined in this cause. No proofs are necessary to establish the fact that the natural and intended result of such conduct would be intimidation.

“His whole conduct, as sworn to by himself, constitutes, in our opinion, a deliberate disregard of the terms of the injunction with which he had been served prior to the time in question. It is, in our opinion, idle for the respondent to say that his purpose in joining the crowd surrounding Bert Brown was to peaceably solicit Brown’s membership in the union. Neither the time nor the circumstances were such as would make such an appeal possible. The claim of the respondent in this respect is, in our opinion, a mere colorable pretext to justify his conduct.”

The language we used in *Beck v. Railway T. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407, is applicable here:

“The law abhors subterfuges, it lays aside the covering, and looks to the actual facts beneath. In the language of Chief Justice Shaw: ‘The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume’: *Commonwealth v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346.

“Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats.

“To picket complainant’s premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways ¹⁸⁷ and public streets must be free to all for the purposes of trade, commerce and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done ten or one thousand feet away.

“It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word ‘picket’: ‘A body of men belonging to a trades union sent to watch and

annoy men working in a shop not belonging to the union, or against which a strike is in progress': Century Dictionary; Webster's Dictionary. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it."

The court sentenced the respondent Ludwig to serve a period of ten days in the Wayne county jail. The evidence fully justified the finding of the circuit judges.

The judgment is affirmed.

McAlvay, C. J., and Carpenter, Blair and Moore, JJ., concurred.

The Case of Ideal Mfg. Co. v. Ludwig.—In re Hamlyn, 149 Mich. 699, 113 N. W. 20, is the companion of the principal case. In the latter case, Hamlyn, who was adjudged guilty of contempt of court in violating the injunction mentioned in the principal case, was one of the same hostile crowd of strikers which unlawfully interfered with nonunion employes, and his act was substantially the same as that shown by the principal case, although his language used was somewhat different. The supreme court ruled that the case here noted was in all respects governed by the principal case, and the same judgment was rendered therein.

Boycotting is the subject of a note to Gray v. Building Trades Council, 103 Am. St. Rep. 488. That boycotting, picketing, and kindred practices of trade unions will be enjoined when carried to the extent of coercion or intimidation, see Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 117 Am. St. Rep. 145; Purvis v. United Brotherhood, 214 Pa. 348, 112 Am. St. Rep. 757.

CAMPBELL v. CAMPBELL.

[149 Mich. 147, 112 N. W. 481.]

DIVORCE—Cruelty—Refusal to Cohabit.—Refusal of cohabitation by a wife with her husband for three years is extreme cruelty, and a ground for divorce. (p. 661.)

DIVORCE—Cruelty—Accusations of Infidelity.—Repeated and unfounded accusations by a wife of adultery committed by her husband, if made in the presence of others, constitutes extreme cruelty, and is ground for divorce. (p. 662.)

G. X. M. Collier, for the complainant.

R. I. Lawson, for the defendant.

¹⁴⁷ MOORE, J. The bill of complaint in this cause was filed praying for divorce on the ground of extreme cruelty.

The complainant alleges in his bill that since November 16, 1903, the defendant has absolutely refused to occupy the same sleeping-room and refused to cohabit with him; that she refused to prepare his meals, attend to and care for his sleeping-room, clothes and washing; that she took up the carpet in his sleeping-room, and, when requested by him to replace it, as it was uncomfortable in cold weather, replied that the bare floor was good enough ¹⁴⁸ for him; that the defendant took from the complainant's bed two new blankets he had purchased to make himself comfortable, and would not let him have them; also that the defendant has frequently charged him with infidelity, without just cause, and has charged him with keeping the society of bad women.

The defendant answered, denying the acts of cruelty charged, and alleged that the cause of their domestic unhappiness was the fault of the complainant, in that the complainant has set about with deliberation to divorce the defendant. The parties were married January, A. D. 1865, in Nankin, Michigan. The defendant lived with complainant as husband and wife until November 16, 1903. There were two children born to them. The case was heard in open court. The case is brought here by appeal.

Some of the alleged acts of cruelty are explained by the defendant, but the record discloses that for three years defendant refused to cohabit with the complainant. He testified unqualifiedly that she refused to cohabit with him. In her testimony the defendant said: "The reason that I have not occupied the same bedroom with Mr. Campbell for the last three years is because he is not as I thought he should be."

When she gave her testimony she then expressed a willingness to resume her marital relations with him. Refusal of cohabitation has repeatedly been held to be a ground for divorce: *Menzer v. Menzer*, 83 Mich. 319, 21 Am. St. Rep. 605, 47 N. W. 219; *Whitaker v. Whitaker*, 111 Mich. 202, 69 N. W. 1151. The testimony clearly shows that defendant repeatedly accused complainant in the presence of others with the offense of adultery. The following occurred in her examination as a witness:

"Q. Why did you tell Miss Stanners that he was going with bad women? A. Because I supposed he was."

The record is barren of testimony which would warrant the inference of adultery. We think the court was right ¹⁴⁹ in granting the decree: See *Whitmore v. Whitmore*, 49 Mich. 417, 13 N. W. 800; *Donaldson v. Donaldson*, 134 Mich. 289, 96 N. W. 448.

Complaint is made in relation to the disposition of the property. Inventories of the property owned by the respective parties were filed. These showed the wife to have property valued at fourteen hundred and forty-eight dollars and the husband to have property of the net value of twelve thousand two hundred dollars. The decree allows defendant to keep all her property, gives her all the household furniture, and requires the husband to pay her five thousand dollars. There are no children to be supported. We think defendant cannot complain of this division of property.

The decree is affirmed.

Blair, Montgomery, Ostrander and Hooker, JJ., concurred.

Cruelty as a Ground for Divorce is the subject of a note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 69. Repeated charges of adultery or infidelity may constitute cruelty: *Page v. Page*, 43 Wash. 293, 117 Am. St. Rep. 1054, and cases cited in the cross-reference note thereto; so, it seems, may a refusal of cohabitation: *Menzer v. Menzer*, 83 Mich. 319, 21 Am. St. Rep. 605, but see contra, note, ante, pp. 632 to 634.

O'DELL v. GOFF.

[149 Mich. 152, 112 N. W. 736.]

WILLS—Evidence of Paternity of Contestant.—A deposition filed in a divorce suit brought by the testator against the contestant's mother, in which the deponent testifies to her admission of her infidelity before the contestant was born, is admissible to prove that the testator had good grounds to doubt the paternity of his child. (pp. 665, 666.)

INSANITY.—Belief in Spiritualism is not evidence of insanity. (p. 666.)

WILLS Due to Spiritualistic Belief—Testamentary Capacity.—A testator may think so continually and persistently upon the subject of spiritualism as to become a monomaniac, incapable of reasoning, where this subject is concerned, and in such case a will made in consequence of such monomania is void for lack of testamentary capacity. (p. 667.)

WILLS Due to Spiritualistic Belief.—A believer in spiritualism may have such extraordinary confidence in spiritualistic communications, whether reaching him through mediums, or directly, that he

is impelled to follow them blindly and implicitly, and if so, his free agency is destroyed, and a will made under such circumstances is not the will of the testator, and is not entitled to probate. (p. 667.)

WILLS Due to Spiritualistic Belief—Undue Influence.—If the evidence in a will contest tends to prove that in making his will the testator was influenced unduly by spiritualistic communications, and that he was a monomaniac upon the subject of spiritualism, the question as to whether such belief overcame the testator's mind and compelled him to make the will in question, thus constituting undue influence, is for the jury to determine. (p. 668.)

WILLS—Testamentary Capacity—Spiritualistic Belief.—If a will is contested on the ground of want of testamentary capacity in the testator, caused by monomania on the subject of spiritualism, the truth or falsity of the spiritualistic faith is not in issue, and evidence that the testator was a monomaniac merely because he believed in spiritualism is not admissible. (p. 668.)

WILLS—Spiritualistic Belief—Evidence—Insanity.—If a will is contested on the ground of want of testamentary capacity in the testator, caused by a belief in spiritualism, evidence by one duly qualified that there was nothing irrational from the standpoint of a spiritualist in the belief by the testator that a medium in a trance might do him harm is admissible as tending to remove from the mind of the jury the impression which might otherwise exist that such particular belief was evidence of insanity. (p. 668.)

WILLS—Evidence of Want of Testamentary Capacity—Belief in Spiritualism.—In a will contest a witness who has testified to want of testamentary capacity in a testator, caused by his belief in spiritualism, cannot be cross-examined upon the subject of other religious beliefs and their effect on testamentary capacity. (p. 668.)

WILLS — Insanity — Cross-examination.—The refusal of the court to compel a witness in a will contest, upon cross-examination, to state which of several circumstances indicating insanity in the testator was, in his judgment, the most significant, is wholly within the discretion of the trial court. (p. 668.)

WILLS.—Declarations of a testator tending to prove lack of testamentary capacity, made after the execution of the will, are admissible in evidence. (p. 669.)

A. L. Free and M. L. Howell, for the appellants.

Lyle & Eby, H. D. Smith and V. M. Gore, for the appellee.

154 CARPENTER, J. This suit is brought to secure the probate of the will of John F. Goff, deceased. The proponents are the executors named in said will. The contestant is the son of the testator. The will in question was made November 3, 1885, when the testator was sixty-six years old. It has a codicil made September 23, 1897, at which time the testator was seventy-eight years of age. Testator died in 1904, when he was eighty-five years of age. The will and codicil disposes of testator's entire estate, aggregating in value forty-one thousand dollars. The residue—constituting the bulk of the

estate—is bequeathed “to be used as a nucleus in ¹⁵⁵ founding, building and equipping a home for poor and aged mediums.” Only eighteen hundred dollars is given to contestant, who is described as testator’s “reputed son.” It should also be stated—and this is an important circumstance—that spiritualistic mediums whom the testator had been in the habit of consulting, and through whom he received spiritualistic communications, received small legacies. Testator was married August 6, 1854, to contestant’s mother. In May, 1855, he commenced suit for divorce in the circuit court for the county of Cass, in chancery, charging her with adultery. This suit was dismissed by stipulation, and the parties resumed their marital relations. Contestant, the son, was born in September, 1855. August 5, 1856, testator again commenced suit for divorce. This time he filed his bill in the circuit court for Elkhart county, Indiana, and a decree of divorce was granted on the ground of desertion on the 17th of October, 1856.

After the granting of said last-mentioned divorce—which I think it may be assumed was invalid—Mrs. Goff and contestant, her son, went to California to live. There she remarried, and died in 1870. The testator has always believed and insisted that his wife was guilty of adultery and that contestant was not his son.

He was a man of more than usual business ability. When the Indiana divorce was granted, he was worth only three thousand dollars or four thousand dollars, and when he died, as already mentioned, he had accumulated an estate of forty-one thousand dollars.

When the will was made, and for many years prior thereto, and from that time until he died, he was a firm believer in the doctrine of spiritualism. He believed that the spirits of the departed communicated with him, not only through mediums, but directly. He believed that he talked with the apostles. He believed in the materialization of spirits and other spiritualistic phenomena, and one witness testified that he said his will was dictated by spirits. The trial court charged the jury that they might render a verdict finding that the instrument in question was not the last will and testament of John Goff, upon either of the following three grounds:

¹⁵⁶ 1. That John Goff was, “at the time of making the will, laboring under an insane delusion in regard to the paternity of his child, which governed or controlled him in the execution

of his will. In the same connection is also involved the question whether he was laboring under an insane delusion that his wife had been guilty of adultery."

2. That the will was "the result of undue influence over the mind of John Goff, manifested by the belief that communication from deceased persons had advised him how to make his will by adopting such communications as his guide in making the will and to the exclusion of his own free will and choice."

3. That John Goff was "a monomaniac upon the subject of spiritualism to such an extent and intensity as to produce that mental derangement which rendered him incapable of comprehending and appreciating the natural objects of his bounty."

The jury rendered a verdict in contestant's favor. We are asked to reverse the judgment entered upon said verdict on various grounds, which, so far as needful, we will discuss.

1. Insane delusion: Was the belief of testator that he was not the father of contestant an insane delusion? It was certainly a delusion; for on this record we are bound to say that contestant was testator's son. (This subject will again be noticed in this opinion.) Was this delusion an insane delusion? That was a question submitted to the jury. Proponents contend that there was no evidence to warrant the submission of this question, because, they say, "there is no evidence that tends to show" that this delusion was produced by testator's belief "in spiritualism or in spirit communications." We content ourselves with saying there is such testimony. Proponents insist—and in this they may be right—that testator believed in his wife's adultery and contestant's illegitimacy before he became a spiritualist. But there is testimony indicating that he would not have continued to¹⁵⁷ believe in said illegitimacy as he did when the will was made had he not received and given implicit credit to spiritualist communications informing him that contestant was not his son. In short, there is evidence that testator's belief in contestant's illegitimacy which influenced the making of the will was produced by spiritualistic communications.

In this connection, we discuss certain objections to the admission and exclusion of testimony relating to this delusion. There was found in the files in the divorce proceedings of the Indiana court a deposition of William P. Bennett (an old and deceased resident of Cass county), wherein he testified that testator's wife, Rowena Goff, admitted in his presence that she

committed adultery with several men at different times and places while she was living with testator and many months before the boy—contestant—was born. This deposition was admissible, not to prove the facts testified to by the witness, but to prove that testator had good grounds to doubt the paternity of his child. The trial court held it not admissible for this purpose, because there was no evidence that testator had ever seen the deposition. In so deciding the court proceeded upon the assumption that the jury could not infer that the testator, the complainant in the suit, was informed of the testimony which he introduced to establish it. This assumption was erroneous. It is to be presumed that he knew of it. While I have found no case in which this principle is announced, it is recognized in the following: *Richards v. Morgan*, 4 Best & S. 641; *Blanchard v. Hodgkins*, 62 Me. 119. Other objections to rulings excluding and admitting testimony upon the subject of insane delusion are made. They are not well taken and require no discussion.

2. Did testator's belief in spiritualism destroy his testamentary capacity? His belief in spiritualism was not evidence of insanity: *Bonard's Will*, 16 Abb. Pr., N. S., 128; *Rood on Wills*, sec. 129; *In re Spencer*, 96 Cal. 448, 31 Pac. 453; *Will of Smith*, 52 Wis. 543, 38 Am. Rep. 756, 9 N. W. 665; ¹⁵⁸ *Buchanan v. Pierie*, 205 Pa. 123, 97 Am. St. Rep. 725, 54 Atl. 583. One accepts his religious faith on evidence that is satisfactory to his mind. A court of law will never inquire whether that faith is sound or unsound. It does not possess the machinery for executing such an undertaking. It will content itself with saying—and that is sufficient for the purposes of this case—that one's religious faith affords no evidence of insanity.

It does not follow, however, that one may not have such a faith in spiritualism as to destroy his testamentary capacity. He may think so continually and persistently upon this subject as upon many other subjects as to become a monomaniac, incapable of reasoning, where this subject is concerned. In that case it should be said that a will made in consequence of such monomania is void for lack of testamentary capacity: *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197, 40 L. R. A. 256. So, too, a believer in spiritualism may have such extraordinary confidence in spiritualistic communications—whether those communications reach him through mediums or are received by him as he believes

directly—that he is compelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of testator, and is therefore not admissible to probate. We need not speculate as to the ground upon which this conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity, or, as held by the trial court, upon the ground of undue influence: See, also, *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473. It is sufficient to say that a will brought about by an influence which the testator could not resist is not his will.

Tested by the foregoing principles, which were recognized by the trial court, it cannot be said that there was no evidence upon which these issues should have been submitted to the jury. Indeed, we do not understand that it is claimed that there was no evidence tending to prove ¹⁵⁰ that testator was a monomaniac on the subject of spiritualism. There certainly was such testimony. There was testimony tending to prove that testator's faith in spiritualism had led him to many strange conclusions; for instance, that on one occasion a spirit brought him a crisp new five-dollar bill, and that on another occasion a spirit—designated by him as an evil spirit—tried to take his life with a butcher knife when he was lying in bed. There is evidence, too, that his mind dwelt upon the subject of spiritualism so persistently and profoundly as to make him incapable of reasoning when that subject was concerned. In short, there was evidence tending to prove that he was a monomaniac upon the subject of spiritualism. It is claimed, however, that there was no testimony tending to prove that the will was procured by undue influence. Undue influence, as here used, means that spiritualistic communications overcame the testator's mind, and compelled him to make the will in question. There certainly was testimony tending to prove that in making the will testator was influenced by spiritualistic communications. And it is a significant circumstance (see *Matter of Beach*, 23 App. Div. 411, 48 N. Y. Supp. 437), already alluded to, that many of these communications came through mediums who are both directly and indirectly beneficiaries in the will. From testator's actions and declarations the inference might be drawn that he was incapable of resisting the influence of these communications. There was therefore evidence of undue influence.

In this connection we consider objections to rulings admitting and excluding testimony upon the subject of testamentary capacity. As the truth or falsity of the spiritualistic faith was not at issue in this suit, it was proper for the trial judge to exclude testimony tending to prove it true—herein is included testimony showing the foundation upon which spiritualism rests—and it was improper for him to admit, as he did, testimony tending to prove it untrue. For the same reason, it was improper for contestant's counsel to suggest during the taking of the testimony ¹⁶⁰ and to argue at the conclusion of the testimony that spiritualism was untrue. According to the foregoing rule, witnesses should not have been permitted to testify that testator was a monomaniac merely because he believed in spiritualism. Generally speaking, this rule was regarded. I think, however, in the case of contestant's witness George Longsduff this rule was disregarded. The witness himself testified on cross-examination: "My definition of a 'monomaniac' [and he had testified that testator was a monomaniac] would include any spiritualist who believed that they could receive communications from the departed."

The court refused to permit proponents to prove by one who was duly qualified to give such testimony that there was nothing "irrational from the standpoint of a spiritualist in the belief of John Goff [and he had such a belief] that a medium in a trance might do him harm." This was error. The excluded testimony would tend to remove from the mind of the jury the impression which might otherwise exist that the particular belief above referred to was evidence of insanity.

We have examined the other complaints respecting the rulings admitting and excluding testimony upon the question of testamentary capacity. None of these rulings were prejudicial. Most of them were clearly correct. As an instance of such rulings, we mention the refusal of the court to permit proponents' counsel to cross-examine certain witnesses of contestant, who had testified to lack of testamentary capacity, upon the subject of other religions and their effect on testamentary capacity. This ruling was correct: See *In re Hogmire's Appeal*, 108 Mich. 410, 66 N. W. 327. Other rulings related to questions within the discretion of the trial court. As an instance of these latter rulings, we mention the refusal of the court to compel one of contestant's witnesses upon cross-examination to state which of several circumstances indicating insanity was, in his judgment, the most significant.

3. Testimony that contestant resembled testator: ¹⁶¹ Contestant was permitted to prove by various witnesses that he resembled testator. The purpose of this testimony was to prove that testator was contestant's father. Proponents contend that this testimony was incompetent. This is a question which, upon this record, we are not called upon to determine, for the testimony was not prejudicial. It could be prejudicial only upon the assumption that the jury used it as evidence that contestant was testator's son. Their use of the testimony for that purpose would not injure proponents, because upon this record the fact that contestant was testator's son was conclusively established. Contestant was born in lawful wedlock, and there is no evidence whatever that his mother committed adultery (though there is evidence that testator entertained that belief). It will be perceived that, according to our ruling, it was quite unnecessary for the contestant to introduce the testimony under consideration, and the trial court might properly have excluded it, and he may properly exclude it upon a second trial if the record is like the one before us, because it relates to an issue which the jury will not be called upon to determine.

4. Declarations of testator after the making of the will: Complaint is made because the trial court permitted contestant to prove various declarations of testator tending to prove lack of testamentary capacity made after the making of the will. This testimony was properly admitted under the rule recognized in *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372.

Proponents' brief is a printed volume containing two hundred and sixty-nine pages. In taxing costs contestants will be required to pay only for a brief of eighty pages. Such a brief would have been ample and more serviceable.

Judgment reversed, and new trial ordered with costs.

McAlvay, C. J., and Grant, Blair and Moore, JJ., concurred.

A Belief in Spiritualism is not evidence of a lack of testamentary capacity: *Buchanan v. Pierie*, 205 Pa. 123, 97 Am. St. Rep. 725; note to *People v. Hubert*, 63 Am. St. Rep. 91; *Owen v. Crumbaugh*, 228 Ill. 380, ante, p. 442.

KLEIN v. POLLARD.

[149 Mich. 200, 112 N. W. 717.]

ARREST, UNLAWFUL—Woman Walking Streets.—A police officer is not justified, without a warrant, in arresting a woman quietly walking the streets of a city at any hour of the night and apparently engaged in no criminal conduct, simply because she has emerged from a disreputable place. (p. 673.)

FALSE IMPRISONMENT—Mitigation of Damages.—In an action for false imprisonment in arresting a woman on suspicion that she was plying a prostitute's vocation, or intended to do so by solicitation, the arresting officer is entitled to show, in mitigation of damages, that his superior officers had ordered the arrest of all women found on the street under the circumstances in which the arrest in question was made. (p. 674.)

R. I. Lawson and W. G. Fitzpatrick, for the appellant.

F. H. Warren, for the appellee.

²⁰⁰ GRANT, J. Plaintiff is the wife of one William C. Klein, who kept a saloon at 227 Jefferson avenue, in the city of Detroit. In the back part of his saloon was a room with tables for drinking and a bed. The saloon was one of ill-repute and the resort of prostitutes. On one occasion a policeman found in this bed the bartender and a prostitute undressed, and arrested them. Mr. Klein kept his saloon open during the night, in open violation of the law, and apparently without any effort on the part of the city authorities to compel him to obey the law. The saloon is ²⁰¹ located in what is known as the "central precinct," in which are located many, if not most, of the disreputable houses of the city, and where common prostitutes and other criminal classes resort. Counsel for defendant in his brief says: "Practically all disorderly places, houses of prostitution, etc., in the city of Detroit are in the central precinct, which embraces the territory between Hastings street and Fourth street, and running north to Charlotte avenue and Brewster street. Previous to the year 1905 (the time not being disclosed by the record) the number of lewd women plying their vocation on the streets and sitting in saloons waiting for company became so great that, to discourage the trade, a general order was issued to the officers and men of the central precinct to frequently visit all saloons catering to women trade and to bring in all women of known bad

repute, or such as might be found on the street at an unusual hour and who failed to give a satisfactory account of themselves. As a result of this order over four hundred women were brought in during the year 1905.”

The proofs establish the above statement. The defendant is a policeman, and his beat in February, 1905, included Mr. Klein's saloon. Plaintiff and her sister, a girl sixteen years of age, after spending the evening upon the streets, went to this saloon about 10:30 o'clock. The sister had made an appointment to meet one Nuss at Klein's saloon, where he played the piano. The women remained in the saloon until about midnight, when plaintiff's sister and Nuss went out. A few minutes afterward plaintiff came out of the saloon, stood for a moment at the door, looking up and down the street, and then with her head hanging down walked out along the street. The defendant saw her, went to her, and asked her who she was. She testified that she told him who she was. Defendant testified that she told him it was none of his business. She testified: “Is it not a fact, Mrs. Klein, that when you came out of that saloon you looked first right and left when you came to the door to see if the coast was clear, and then came down the avenue, with your head hanging down, ²⁰² that you went down Randolph, turned north on Randolph on the east side, and that the officer came along behind you, intercepted you by coming diagonally across Randolph, and intercepted you about half way between the alley and the corner—is that true? A. Yes, sir.”

He then, in accordance with his instructions, took her to the police department before the lieutenant in charge. She told the lieutenant who she was, satisfied that officer that her statement was true, and was promptly dismissed. She brought this suit to recover damages for assault and battery and false imprisonment. The case was submitted to the jury who found a verdict for the defendant.

The charter of the city of Detroit confers upon the common council power to “Provide for the general peace, order and good government of said city. To ‘prohibit and suppress the keeping and leasing of houses of ill-fame, or assignation, or for the resort of common prostitutes, disorderly houses, and disorderly groceries. It may restrain, suppress and punish the keepers thereof, and the owners and lessors of such premises; it may punish, restrain and prevent common prostitutes, vagrants, mendicants, street beggars, drunken or dis-

orderly persons.' To enact all ordinances necessary to carry into effect the powers conferred by law upon said council, and to provide for the punishment of all persons offending against this act, or any law relating to said city, or any ordinance of the common council enacted under this or any other act of the legislature, by imposing fines, penalties, forfeitures and costs, and by imprisonment in the house of correction of said city": Charter of Detroit (1904), secs. 171, 183, 190.

The charter (section 665) also provides: "It shall be the duty of the commissioner of police and of the force hereby constituted, at all times of the day and night, within the boundaries of said city, to preserve the public peace and prevent crime, arrest offenders and protect the rights of persons and property, guard the public health, preserve order and enforce all the laws of the state and the ordinances of said city."

²⁰³ Acting under this power the common council enacted the following ordinances:

"All able-bodied persons who, not having visible means of support, are found loitering or rambling about or lodging or loitering in drinking saloons, tippling houses, beer houses, houses of ill-fame, houses of bad repute, vessels, sheds or barns, or in the open air, and not giving a good account of themselves, . . . shall be deemed disorderly persons, and upon conviction thereof shall be punished as hereinafter provided.

"No person shall keep, within the limits of the city of Detroit, any house of ill-fame, house of assignation, or house for the resort of common prostitutes, or a disorderly saloon, bar-room, tavern, beer-hall, grocery, theater, room, ordinary, house or building of any kind, or any house, room or building for gaming with cards, dice, billiards, nine or ten-pin alleys, wheels of fortune, boxes, machines or other instruments or devices whatever, or shall in any manner contribute to the support, carrying on or keeping of any such house or place."

The case was submitted to the jury, who, after deliberation, returned a verdict for no cause of action.

1. The court in his charge said to the jury that it was clearly proven that the saloon from which the plaintiff came at midnight was a disorderly one. The fact so stated is not denied. The court instructed the jury that, if the defendant's statement as to what happened between him and plain-

tiff was correct, he was justified under the law in taking the plaintiff to police headquarters for examination by the lieutenant in charge. This presents the principal question in the case. It is the contention of counsel for the plaintiff that her arrest was unlawful because it was without a complaint or warrant, and she was not suspected of having committed a felony, neither was she engaged in committing ²⁰⁴ a breach of the peace. *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215, and *Robinson v. Miner*, 68 Mich. 549, 37 N. W. 21, do not control this case. In neither of those cases was there any excuse for arresting the party without obtaining a warrant. One was the case of a peddler in a street, the other the case of a saloon-keeper keeping his saloon open at a time prohibited by law. The duty imposed upon the police department to protect the city from vagrants, night-walkers, gamblers, and other sorts of criminals who ply their vocation largely in the night is an important and difficult one. No rule can be laid down governing all the circumstances under which a party under suspicion may be arrested. It is, however, established by a decision of this court (which seems to have escaped the attention of counsel of both parties and of the trial court, as it is not cited in their briefs) that the arrest of plaintiff was unlawful: *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579, 7 L. R. A. 507. Police officers are not justified in arresting a person quietly walking the streets of the city at any hour of the night simply because he has emerged from a disreputable place. There is no evidence in this case to show that plaintiff was a prostitute, except the fact that she had been seen in her husband's disreputable saloon, and came therefrom late in the night. She was quiet, peaceable, making no disturbance, and there was nothing to indicate that she was plying a prostitute's vocation, or intended to do so, by solicitation. The chief difference between the facts of *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579, 7 L. R. A. 507, and those of this case are that in the former case plaintiff was arrested while peaceably walking the streets about an hour and a half earlier in the night than was the plaintiff in this case. In the former case the evidence on the part of defendant showed that the plaintiff was a prostitute, while in this case there is no such evidence. The defendant testified that he was in

the saloon on the night in question, about a quarter of 11 o'clock, and that "It was my duty to go to this saloon every evening when I was on the beat nights, because it was disorderly, ²⁰⁵ prostitutes frequent there and disorderly men and women. We went to look after it, and put it in good running order, and find who was there."

If the police department would, by complaints and arrests, enforce the law closing this saloon and others, as the law requires, it would much more effectually prevent disorder than the arrest of parties quietly walking the streets and apparently engaged in no criminal conduct. The better way "to put such places in good running order" is to compel obedience to the law which governs them. It follows that the arrest was unlawful, and the court should have so instructed the jury.

2. All circumstances which tended to show the good faith of the defendant were admissible in mitigation of damages. It was therefore competent to show the instruction of the defendant's superior officers in dealing with persons found upon the streets under circumstances in which the plaintiff was found.

Judgment reversed, and new trial ordered.

Blair, Montgomery, Hooker and Moore, JJ., concurred.

For Authorities upon the question of the right of a police officer to make an arrest under the circumstances set forth in the principal case, see the note to State v. Evans, 84 Am. St. Rep. 694.

HANNAH & HOGG v. RICHTER BREWING COMPANY.

[149 Mich. 220, 112 N. W. 713.]

CHATTEL MORTGAGES.—A chattel mortgage is neither a sale nor an assignment. (p. 675.)

FRAUDULENT CONVEYANCES—Sales in Bulk Act—Chattel Mortgages.—A chattel mortgage upon a stock of goods is not a "sale, transfer, or assignment" thereof in bulk within the meaning of a statute relating to sales of goods in bulk and passed for the protection of creditors. (p. 676.)

A. H. Ryall, for the complainant.

Cummiskey & Spencer, for the defendant.

²²⁰ McALVAY, C. J. But one question is involved in this appeal, and that is whether the giving of a chattel mortgage is a sale, transfer or assignment, in bulk, within the meaning of Act No. 223 of the Public Acts of 1905, entitled "An act to regulate the sales, transfers and assignments of stocks of goods, merchandise and fixtures, in bulk." Defendant Oliver Hotel Company, in connection with its business, conducted a bar where liquors were sold. On February 21, 1906, it gave defendant Richter Brewing Company a chattel mortgage upon the entire bar fixtures pertaining to its liquor business, and afterward made a sale in bulk of the same property to the other defendants.

²²¹ The hotel company was, before giving this chattel mortgage, indebted to complainant, which, on May 29, 1906, put its claim into judgment for two hundred and seventy-three dollars damages and two dollars and ninety-five cents costs of suit. On June 5, 1906, an execution issued and a levy was made upon this property, and demand was made of defendants to turn the same over to complainant and release all claim of ownership or title thereto. This demand was refused, and the bill of complaint in this case was filed, upon the theory that the disposition of this property was within the prohibition of the statute invoked, and complainant asked the court to declare the instruments void for that reason, and prayed for other relief. Defendant Richter Brewing Company demurred, raising the question involved. The demurrer was sustained, and a decree entered dismissing the bill of complaint as to demurring defendant.

So much of this statute as is now necessary to quote provides: "The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the business of the seller, transferrer or assignor, shall be void as against the creditors of the seller, transferrer, assignor, unless," etc., giving the notice and proceedings necessary in order to make the transaction valid. While many of the courts hold to the common-law doctrine that a chattel mortgage is an instrument of sale conveying the title of the property, this court has held that the true relation of parties to a chattel mortgage is that of debtor on one side and creditor secured by lien on the other: *Lucking v. Wesson*, 25 Mich. 443. And also that

the title of a mortgagee of chattels does not become absolute until foreclosure and sale: *Kohl v. Lynn*, 34 Mich. 360, and cases cited. It is the settled law of this state that a chattel mortgage is not an assignment: *Sheldon v. Mann*, 85 Mich. 265, 48 N. W. 573; *Warner v. Littlefield*, 89 Mich. 329, 50 N. W. 721; *Wineman v. Fisher E. Mfg. Co.*, 118 Mich. 636, 77 N. W. 245. To ²²² find the legislative intent in construing a statute it is proper for the court to consider the entire statute, the ordinary meaning of the words used, the object of the legislation, and the status of the law of the state in relation to the subject matter under discussion. The terms, "sale, transfer or assignment," used in the entitling and in the body of the act, taken in their usual and ordinary signification, mean the disposition of the entire title of the seller. This meaning is indicated by the provision in the statute relative to notice required to be given to creditors as follows, "and unless the purchaser, transferee and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof." Taking this language and the other language of the act, it is apparent that its object was to regulate those sales made of an entire stock upon an immediate payment and change of possession, and which before the act might have been valid, although in fact a fraud upon creditors. To hold a chattel mortgage within the meaning of the statute it is necessary to hold that it is a sale within the common acceptation of that term, transferring the entire title, and entitling the vendee to immediate possession. This, by the specific terms of this mortgage, which are the same as those of chattel mortgages generally in this state, and under our decisions above cited, cannot be done. The argument is advanced that, having adopted this statute, the court will follow the construction given by the courts of those states from which it is taken. The custom referred to has no binding force upon the courts of the adopting state. In the case at bar the custom cannot be followed, for the reason that no construction has yet been given upon the point involved, and, if construction had been given favorable to complainant, it could not be followed because those states accept the common-law doctrine that ²²³ a chattel mortgage

is an instrument of sale conveying the title of the property, which, as above shown, does not prevail in this state.

It is also urged that the court must hold chattel mortgages within the meaning of the act in order to remedy the mischief sought to be cured. While it is true that the act is intended to prevent certain debtors from defrauding their creditors, it is not for the courts to give the statute a construction it will not bear, because the legislature has not included within its prohibition certain transactions whereby frauds may be and undoubtedly are perpetrated. That is a matter for the consideration of the legislative branch of the government.

We agree with the learned circuit judge that chattel mortgages are not included in the act.

The decree is affirmed, with costs.

Carpenter, Grant, Blair and Ostrander, JJ., concurred.

Statutes Regulating the Sale of Goods in Bulk are generally regarded as constitutional: *Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330. For recent decisions interpreting such statutes, see *Everett Produce Co. v. Smith*, 40 Wash. 566, 111 Am. St. Rep. 979; *Rothchild v. Trewella*, 36 Wash. 679, 104 Am. St. Rep. 973; *Kohn v. Fishbach*, 36 Wash. 69, 104 Am. St. Rep. 941.

IN RE ROGERS' ESTATE.

[149 Mich. 305, 112 N. W. 931.]

TAXATION—Inheritance Tax—Situs of Property.—Mortgages, notes and land contracts representing property situated in one state, owned by and in the possession of a nonresident at the time of his death in another state, are subject to a succession or inheritance tax imposed by the statute of the former state. (p. 678.)

Shields & Shields, for the appellant.

J. E. Bird, attorney general, J. S. Kennary and T. A. Lawler, assistant attorneys general, for the appellee.

305 MOORE, J. This is a case brought for the purpose of recovering, under the provisions of Act No. 195 of the Public Acts of 1903, an inheritance tax. The probate court held it could not be recovered. The circuit court held it could. The facts are not disputed, and, briefly stated, are as fol-

lows: Hosea Rogers died at his home in the state of New York in 1904. Administration of the estate was granted in New York. Ancillary proceedings were had in Livingston county, in this state. All of the ³⁰⁶ estate which in this proceeding is sought to be bound with an inheritance tax consists of mortgages, notes and land contracts. All the devisees, legatees, and heirs at law of Mr. Rogers reside in New York. At the time of his death all the mortgages, notes, land contracts and papers representing property in the state of Michigan were in the actual possession of Mr. Rogers at his residence in New York, and were habitually kept by him at his residence in the state of New York. The mortgages were upon real estate in Livingston county, Michigan, and were recorded in that county. Thomas Gordon, Jr., acted as agent for Mr. Rogers in making loans. He had temporary custody of the funds or securities. He never had power to discharge or modify mortgages or other papers, and acted at all times under the specific directions of Mr. Rogers.

It is the claim of the estate that the situs of this very property has been established as in the state of New York: Village of Howell v. Gordon, 127 Mich. 517, 86 N. W. 1042. The domicile of the parties owning it, both at the time of Mr. Rogers' death, and now, is in the state of New York, and therefore the property is not subject to an inheritance tax in this state. Several authorities are cited in support of this claim, and it is insisted the case is controlled by the Iowa case of Gilbertson v. Oliver, 129 Iowa, 568, 105 N. W. 1002, 4 L. R. A., N. S., 953. In that case the justice writing the opinion said: "The controversy presents for determination but one legal question, namely: Was the property of the deceased within the jurisdiction of this state at the time of her death? There is a conflict in the adjudicated cases as to whether such evidences of indebtedness are taxable at the domicile of the owner, or whether the actual situs of such property, and not the domicile of the owner, determines the liability to taxation. The great weight of authority, however, supports the holding of our own cases that this species of personal property, which is in a sense intangible and incorporeal, is taxable at the domicile of the owner, and not elsewhere, unless the owner has himself given it a different situs."

³⁰⁷ This is not in harmony with *In re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122. On the part of the state it is

insisted the inheritance tax can be collected, and that the case is controlled by *In re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122, *In re Merriam's Estate*, 147 Mich. 630, 118 Am. St. Rep. 561, 111 N. W. 196, and *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439.

It is clear the mortgagee named in the mortgage could not preserve his lien on the real estate against creditors and subsequent purchasers without complying with the registry law of the state. If the debts secured by the mortgages are not paid, they cannot be collected without the aid of the laws of the state. The estate of Mr. Rogers cannot be properly administered and closed without ancillary letters of administration obtained under the laws of this state. In this connection, the language used by Justice Holmes in *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439, is pertinent. We quote:

“If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the state of New York, then New York may subject the transfer to a tax: *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. Rep. 1073, 41 L. ed. 287; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. ed. 579. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant: *Chicago etc. R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144. See *Wyman v. Halstead*, 109 U. S. 654, 3 Sup. Ct. Rep. 417, 27 L. ed. 1068. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to ³⁰⁸ debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable

there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

“Power over the person of the debtor confers jurisdiction, we repeat; and this being so, we perceive no better reason for denying the rights of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim ‘*Mobilia sequuntur personam*’ has no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way.

“There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300, 21 L. ed. 179. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions: *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases: *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 18 Sup. Ct. Rep. 392, 42 L. ed. 803; *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. Rep. 110, 44 L. ed. 174. In the case at bar, the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect: *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. Rep. 52, 46 L. ed. 125. The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds: *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475, 29 L. ed. 715; *Knowlton v. Moore*, 173 U. S. 41, 20 Sup. Ct. Rep. 747, 44 L. ed. 969. The universal succession is taxed in one state; the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money: See *Adams v. Batchelder*, 173 Mass. 258, 73 Am. St. Rep. 282, 53 N. E. 824.”

It is suggested that because, when the opinions in *Re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122, and in *Re Merriam's Estate*, 147 Mich. 630, 118 Am. St. Rep. 561, 116 N. W. 196, ³⁰⁰ were written, the cases arose under section 21, Act No. 188 of the Public Acts of 1899, as section 21 has been amended, those cases are not controlling. The amendment is found in Act No. 195 of the Public Acts of 1903. It consists simply in eliminating from section 21 the words "over which this state has any jurisdiction for the purpose of taxation." We do not think the effect of the amendment is to narrow the provisions of the statute as they existed when the decisions were rendered. We think the case in principle is within *In re Merriam's Estate*, 147 Mich. 630, 118 Am. St. Rep. 561, 116 N. W. 196, and *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. ed. 439.

Judgment is affirmed.

McAlvay, C. J., and Montgomery, Ostrander and Hooker, JJ., concurred.

For Authorities bearing upon the question involved in the principal case, see In re Merriam's Estate, 147 Mich. 630, 118 Am. St. Rep. 561; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475; *Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640; note to *State v. Hamlin*, 41 Am. St. Rep. 583.

HELME v. BOARD OF ELECTION COMMISSIONERS.

[149 Mich. 390, 113 N. W. 6.]

ELECTIONS—Voting Machines—Secret Ballot.—Voting machines cannot be used at an election where it is impossible to so arrange the names of candidates upon such machines as to permit a voter to vote for a certain desired combination of candidates. (p. 682.)

ELECTIONS—Constitutional Law—Voting Machines—Secret Ballot.—A statute which requires a voter at an election at which voting machines are used to call for a paper ballot if he desires to vote for a combination of candidates which cannot be voted for on such machines, is unconstitutional as violating his right to a secret ballot. (p. 682.)

ELECTIONS—Ballots—Nomination by Several Parties.—A statute providing for a special election and making the provisions of the general election law applicable relating to the printing of ballots, prohibiting the printing of a name more than once thereon, en-

titles a candidate to have his name appear but once on the ballot, although he is nominated by several parties. (p. 683.)

ELECTIONS—Voting Machines—Secret Ballot.—Any kind of voting machine may lawfully be used at any election in which the choice between candidates can be expressed by the use of the machine, or by any other method which does not disclose to the inspector or others the purpose of the voter. (p. 683.)

J. W. Helme and T. M. Joslin, in pro. per.

J. E. Bird, attorney general, and T. A. Lawler, assistant attorney general, for the respondent.

³⁹¹ Per CURIAM. The relator is a candidate selected by three parties as delegate to the coming constitutional convention. He asks a mandamus to compel the board of election commissioners of Lenawee county to furnish to each voting precinct in the county printed paper ballots containing his name under the party name of each and every party by which he was nominated.

The record shows that voting machines are used in several precincts, and that it is the intention to use such at the election to be held for said office, and that it is impossible to so arrange the names of candidates upon said machines as to permit a voter to vote for certain combinations of candidates, there being three to be elected. It is admitted that this is true in a strict sense, but it also appears that where a voter desires to vote for such a combination or candidate whose name is not on the machine, he may apply to the election inspector for a paper ballot, which, after preparing, he shall fold and deliver to the inspector, who shall place it in a cartridge and introduce it into a receptacle prepared for it in the machine, and through that into a box, to be counted if it shall be found that the persons voted for could not otherwise have been voted for by the use of the machine.

It is obvious that a voter cannot ask for and vote such a ballot without indicating that he does not vote for his full party ticket, and, to the degree that he is reluctant to have his want of party fealty known, it acts as a deterrent to his voting for the persons of his choice, and operates against his independence as a voter. We are of the opinion that the requirements found in section 10, Act No. 287 of the Public Acts of 1907, are unconstitutional as applied to this case because they violate the right of the elector to ³⁹² vote a secret ballot: See *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141,

and *City of Detroit v. Board of Election Inspectors*, 139 Mich. 548, 102 N. W. 1029, 69 L. R. A. 184.

It appearing that all of the machines in use in this county are subject to this infirmity, i. e., they do not afford an opportunity to all to vote a secret ballot, they cannot lawfully be used, and it is therefore necessary that paper ballots be furnished by respondents for each precinct.

Counsel for relator contend that Act No. 272 of the Public Acts of 1907 renders the general act providing for the printing of ballots, and prohibiting the printing of a name more than once, inapplicable to this election, inasmuch as it provides in express terms that: "The names of the three candidates nominated by each or any political party in each senatorial district, . . . shall be printed upon the official ballots of the various political parties."

We think otherwise. Section 4, Act No. 272 of the Public Acts of 1907, provides that: "All laws not inconsistent with this act, regulating the printing of the ballots . . . shall be applicable to the printing of the ballots," etc.

The general law contains a similar provision, with the limitation mentioned, which we think applicable here. Therefore relator's name can appear but once.

The writ will issue as above indicated.

ON MOTION FOR REHEARING.

Per CURIAM. A motion for a rehearing of this cause has been made, and it is asked that, in case such relief shall not be granted, we indicate, by an addendum to the opinion filed, that the device shown by an amended return which is said to enable the voter to cast his ballot with absolute secrecy, is not open to the objection stated in the opinion heretofore filed. In view of the far-reaching effect of our decision, and the important interests, both ³⁹⁸ public and private, which might be injuriously affected by any general misapprehension of its scope, we deem it proper to say that it was not intended to hold or intimate that the voting machine in question was open to objection in any election in which the choice between candidates can be expressed by the use of the machine, or by any other method which does not disclose to the inspector or others the purpose of the voter.

It follows that any device which insures absolute secrecy is not within the mischief condemned by our opinion.

Statutes Authorizing the Use of Voting Machines are generally unobjectionable on constitutional grounds: *U. S. Standard Voting Machine Co. v. Board of Supervisors*, 132 Iowa, 38, ante, p. 539, and cases cited in the cross-reference note thereto.

The Constitutionality of Election Regulations which deny to voters the right to vote for candidates of their choice is considered in the note to *Chamberlain v. Wood*, 91 Am. St. Rep. 686.

PEOPLE v. BROCK.

[149 Mich. 464, 112 N. W. 1116.]

CONSTITUTIONAL LAW—Jury Trial—Venue.—A statute providing that larceny in a railroad car en route through the state may be prosecuted in any county through which the car passes is void as being in violation of a constitutional guaranty of trial by jury in the county where the alleged crime was committed. (p. 684.)

Rockwell & Zimmerman, for the appellant.

F. L. Covert, prosecuting attorney, and C. S. Matthews, assistant prosecuting attorney, for the people.

465 HOOKER, J. The defendant was convicted of stealing property from a car en route from Detroit to Ovid, under 3 Compiled Laws, section 11633. He was convicted in Oakland county, and the proof indicated that the act was committed in the adjoining county of Wayne and not in Oakland county, and no testimony was offered tending to show that the articles were stolen in Oakland county, where the information alleges that they were stolen. The court instructed the jury that the defendant might, lawfully, be convicted of the offense charged, although the theft was committed in the county of Wayne and not of Oakland. This was clearly error unless the same was justified by the statute cited, which provides: "That every person who shall commit the crime of larceny in a railroad car while in the state of Michigan, and en route, shall be liable to prosecution in any county through which said car passes, and any court of competent jurisdiction of said county shall have jurisdiction to try and determine said cause the same as though said offenses had been committed in the county where the complaint is made."

Counsel for respondent claim that said section is in conflict with article 6, section 27, of the constitution, i. e.: "The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law."

The case of *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635, construed this section of the constitution, holding that the right there reserved to the people was trial by jury as it had become known to the previous jurisprudence of the state, one of the essentials of which was a trial in the county where the alleged offense was committed. In that case ⁴⁶⁶ a prosecution for trespass on state lands was attempted in a county other than that in which the lands were situated. The act was held void.

It is contended that the statute upon which the case now before us rests is distinguishable, and may be sustained. This claim may be resolved into the suggestion that when property has been stolen from a railroad car in transit, there may be difficulty in proving where the car was at the time the property was taken, and therefore that there is a necessity for such a statute; otherwise the offense cannot be charged with any degree of accuracy or certainty of conviction.

It is no uncommon thing to have criminal prosecutions fail for want of proof, and while the danger of such failure may be greater in this class of cases than in others, it is not made clear to us how a man can be lawfully deprived of a constitutional right for such a reason. It would be a startling innovation should we say that the legislature has power to subject a person charged with crime to prosecution in any one of several counties, covering a strip of territory coextensive with the length or breadth of the state, at the prosecutor's election, and yet that is what this statute authorizes if it is valid. It cannot be said that this offense was in "contemplation of law" committed in each of said counties, as in a case where property stolen in one county is carried by the thief into another, or possibly where an act done in one county contributes to the commission of the offense in another: See 2 Wharton on Criminal Law, sec. 1397.

Whatever may have been held by the courts of other states, the cases of *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635, and *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899, settle the rule for Michigan. It is unnecessary to pass on other questions raised.

The judgment is reversed, and a new trial ordered.

McAlvay, C. J., and Carpenter, Grant and Moore, JJ., concurred.

A Statute Authorizing the Prosecution of rape in some county or judicial district other than the one in which the crime is committed is held constitutional in Mischer v. State, 41 Tex. Cr. Rep. 212, 96 Am. St. Rep. 780.

MUDGE v. SUPREME COURT, INDEPENDENT ORDER OF FORESTERS.

[149 Mich. 467, 112 N. W. 1130.]

INSURANCE, LIFE—Misrepresentations in Application—Waiver of by Insurer.—If an applicant for life insurance knowingly and intentionally gives false answers concerning his past state of health, thereby rendering his policy void, the fact that both the agent who took the application and the physician making the examination knew such answers to be false and wrote them as given does not constitute a waiver, or estop the insurer from denying the truth of such answers. (p. 687.)

INSURANCE, LIFE—Breach of Warranty—Sufficiency of Evidence.—Although a life insurance policy makes the by-laws of the insurance company a part of the contract, its failure to offer them in evidence in an action on the policy is not ground for a reversal of the judgment against the insured, when the policy and a physician's examination and testimony are sufficient to show a breach of the contract of insurance. (p. 691.)

J. B. McIlwain, for the appellant.

E. G. Stevenson and C. A. Hovey, for the appellee.

⁴⁶⁷ HOOKER, J. The plaintiff in this cause is a widow, and beneficiary in a fraternal benefit certificate. Her action is brought to recover the amount thereof, and is predicated upon the death of her husband. The defense ⁴⁶⁸ is reduced to one claim, viz., that the deceased made an intentionally false answer, in his medical examination, to the question "Have you ever had the disease of insanity?" Upon the trial the learned circuit judge was of the opinion that the undisputed testimony established this defense, and he therefore directed a verdict for the defendant and afterward denied a motion for new trial. The plaintiff has appealed.

The undisputed testimony shows that the insured had previously been insane, and confined in the asylum as insane, for three months, upon an adjudication by the probate court that he was insane, based upon an application sworn to and filed by this plaintiff stating that he was insane. It also shows that he had delusions, and that he had attempted suicide twice. It

appeared with equal conclusiveness that he knew that he had been confined and treated as insane, and there was no testimony that he stated these facts to the agent or examining physician and was not a party to the insertion of the false answer in the application or report of the examining physician. On the contrary it was shown that his answers were faithfully recorded. There is no occasion to allude to the attempted discrimination between "insanity" and the disease of insanity under the facts in this case. Hence we find that upon this record the judge was warranted in saying that the proof established the insured's insanity, his knowledge of and fraudulent concealment of the same. There can be no question that this was sufficient to deprive his beneficiary of the right to recover, unless the company was estopped to assert the claim by reason of the alleged knowledge of its agents, or by a waiver.

It is contended that there was evidence tending to show that both the agent who took the application and the physician who made the examination knew, at that time, that the insured had been insane, and that his answers were false, and that this was the knowledge of the defendant, and is sufficient to estop it from denying the truth of the answer. Were this a case where the insured ⁴⁶⁹ had made no misrepresentation in his answer, and was excusably ignorant of fraudulent conduct on the part of the company's agent in inserting an answer different from that given, there might be reason for this claim. In this case the most that plaintiff's counsel could possibly contend is that, by collusion between the applicant and defendant's agent, they made a false answer, and now seek to hold the company, by making a "sword instead of a shield" out of the salutary rule, that the knowledge of the agent is notice to the principal. Good faith is always essential to an estoppel.

In *American Ins. Co. v. Gilbert*, 27 Mich. 429, where the insured answered truly, but the agent inserted a false statement, with his knowledge, stating that it was right, and the insured signed, honestly believing that it was right, this court in reversing a judgment for plaintiff said: "The very form and obvious purpose of the application with the consideration contained in it, showed that the statements it contained were to be understood as made by the applicant and upon his responsibility, as the basis of the contract of insurance he expected to obtain. And, though a person ignorant of the

meaning of the particular terms of special provisions used in such papers, or in the policy, or of the sense attached to them by the insurers, or of the particular rules or manner of doing business, has a right to rely on the instructions and assurances of the agent of such insurers, and upon his acts in reference to such matters, in filling out the application; yet he cannot, therefore, escape the responsibility for the statement of facts which he inserts himself in the application, or permits the agent to insert as his, upon which he is just as well informed as the agent himself."

In the case of *Michigan Mut. Life Ins. Co. v. Reed*, 84 Mich. 524, 47 N. W. 1106, 13 L. R. A. 349, the court said: "If the insured had no information of the agent's misrepresentation, the company could not take advantage of the wrong of its agents and avoid the policy, but that it would have been otherwise had the insured conspired with the agent or had the insured, being fully informed of the ⁴⁷⁰ representation made and the contents of the application, neglected to bring it to the attention of the company."

In the recent case of *Ketcham v. American M. Accident Assn.*, 117 Mich. 521, 76 N. W. 5, Mr. Justice Moore said, with the approval of the full bench, that: "It is urged that, as the agent knew the answers were not true, his knowledge was the knowledge of the company, and, having issued the policy, the company is bound. The courts have always been anxious to take care of the rights of the assured when the applicant has relied upon the agent informing the company what had been truthfully told to him about the character of the risk; but the courts never have said the company is bound by statements contained in an application, when not only the agent, but the assured, knows they are untrue, and calculated to deceive, and the application is to be forwarded to the company as the basis of its action. To so hold would put these organizations completely at the mercy of dishonest and unscrupulous agents."

In the case of *Maier v. Fidelity M. Life Assn.*, 78 Fed. 570, 24 C. C. A. 239, Mr. Justice Harlan used the following vigorous language: "It was said in argument that the company should not be permitted to take advantage of the misconduct or wrong of its own agent. But the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself from the frauds and negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible

for the truth of his answers to questions, and if the want of truth in such answers was wholly due to the negligence, ignorance or fraud of the soliciting agent, a different question would be presented. But here the assured was distinctly notified by the application that he was to be held as warranting the truth of his statements 'by whomsoever written.' Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may, in their discretion, relieve parties from the obligations of their contracts, whenever it can be seen that they have acted heedlessly or carelessly in making them, but it is too often forgotten ⁴⁷¹ that in giving relief, under such circumstances, to one party, the courts make and enforce a contract which the other party did not make or intend to make. As the assured stipulated that his statements, which were the foundation of the application, were true, by whomsoever such statements were written, and as the contract of insurance was consummated on that basis, the court cannot, in an action upon the contract, disregard the express agreement between the parties, and hold the company liable, if the statements of the assured—at least, those touching matters material to the risk—are found to be untrue."

In *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, 29 L. ed. 934, Mr. Justice Field said: "A curious result is the outcome of the instruction. If the agents committed no fraud, the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud, he may recover, although, upon the answers given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained."

There are many decisions elsewhere which refuse to apply the rule of estoppel in cases of this kind: 3 *Cooley's Briefs on Insurance*, p. 2569; *Welsh v. London Assur. Corp.*, 151 Pa. 607, 31 Am. St. Rep. 786, 25 Atl. 142; *Pottsville Mut. Fire Ins. Co. v. Fromm*, 100 Pa. 347; *United States Life Ins. Co. v. Smith*, 92 Fed. 503, 34 C. C. A. 506; *Clemans v. Supreme Assembly R. S. of G. F.*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Boyle v. Northwestern M. Relief Assn.*, 95 Wis. 312, 70 N. W. 351; *Provident Sav. Life Assur. Soc. v. Llewellyn*, 58 Fed. 940, 7 C. C. A. 579.

The case of *Perry v. John Hancock M. Ins. Co.*, 143 Mich. 290, 106 N. W. 860, 147 Mich. 645, 111 N. W. 195, is said to establish for this state a different rule and to have overruled the three cases quoted from. Upon its first hearing that case might have turned either on the question of waiver, or on the substantial truth of the answer; it appearing that there was evidence that defendant's agent knew the insured's character when he wrote the policy, and the company's superintendent afterward collected premiums with knowledge of her occupation. ⁴⁷² We held there that unless the warranty that she was a housewife was substantially true, or its truth waived, the policy was void, and that these were questions for the jury. It is a legitimate conclusion that although she maintained a bawdy-house, which the court said was incontestably proved, that it did not necessarily follow that her statement that she was a housewife and had not been in any other occupation for two years was not substantially true. One of the definitions of housewife, viz., "a female manager of domestic affairs," was quoted in the opinion.

Upon a second trial the claim that defendant's superintendent collected premiums was eliminated upon this question. The learned circuit judge instructed the jury: "It does not seem to me that it is a conclusive question, because I think if the money was paid—if the agent at the time he took this application knew of her character and they gave her occupation as housewife, instead of prostitute, that I still think the company would be liable, and in this case I do not think the question is a conclusive question."

This was sustained. It cannot be denied that this gives plausibility to the claim that defendants make, viz., that although both insured and agent knew of her disreputable character and the omission to state it, the knowledge of the agent estopped the defendant. It should be considered, however, in the light of the previous opinion, viz., that her answer might be found substantially true, i. e., that she was a housewife, and that she had not engaged in other occupations within two years. This part of the charge related to the question of waiver, which the court held was not the only question in the case. If he had used the word "might" instead of "would" the decision would not have the significance contended for, and it is quite probable that this language may have been qualified by other portions of the charge relating to the other question in the case. Counsel pertinently suggest

that no allusion was made to the cases quoted from. They ⁴⁷³ could not well have been overlooked, and would not have been ignored had there been an intention to overrule them.

Counsel have raised the further point that the defense should have been held to have failed for another reason. The by-laws formed a part of the contract, and were not offered in evidence by the defendant. The policy and the physician's examination were sufficient to show the breach of contract, and if plaintiff's counsel had claimed that the by-laws would have shown the contrary they would doubtless have produced them. To reverse the judgment upon this ground would be to do so for a very technical reason or upon a presumption that the by-laws nullified the express provisions of the policy. The plaintiff has failed to show any error, and the judgment is affirmed.

McAlvay, C. J., Carpenter, Grant and Moore, JJ., concurred.

The Question Involved in the Principal Case, as stated in the first headnote, will be found discussed in the note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 108-110.

PRESTON v. NEWCOMB.

[149 Mich. 512, 113 N. W. 29.]

JUDGMENT IN BANKRUPTCY—Conclusiveness—Collateral Attack.—A judgment in bankruptcy as to the title to property purchased in the course of such proceedings is conclusive and binding as to all persons and in every court, and cannot be collaterally attacked in another court by showing that such title was obtained by fraud, and was not, in reality, what the record declared it to be. (p. 694.)

BANKRUPTCY, SALES IN—Persons Concluded by.—A creditor of a bankrupt, who was a party to the bankruptcy proceedings, recognized the validity thereof and the discharge of his claim, and took a note to revive it, after a sale in such proceedings, cannot attack the title of the purchaser at such sale. (p. 694.)

BANKRUPTCY—Rights of Subsequent Creditors.—A creditor of a bankrupt, who becomes such after the conclusion of the bankruptcy proceedings, has no pre-existing right to be affected by an adjudication therein, and is not in a position to call it in question. (p. 695.)

BANKRUPTCY, SALES IN—Title of Purchaser.—A person who proves a good title to property acquired by purchase at a sale

in bankruptcy proceedings, and also shows by a written agreement that the bankrupt debtor held the property in recognition of his ownership, is entitled to the property, as against an attaching creditor of the debtor, until such showing is met by evidence to show that such purchaser parted with his title after he had acquired it. (p. 695.)

EVIDENCE—Statements as to Title—Competency.—Declarations of a third person in the possession of property as to the title thereto, or as to the validity of the defendant's claim thereto, not made in the presence of the latter, or brought to his knowledge, are not admissible in evidence. (p. 695.)

A. A. Ellis, for the appellants.

R. A. and W. E. Hawley, for the appellee.

⁵¹³ BLAIR, J. This is an action on two bonds given March 10, 1904, under section 733 of 1 Compiled Laws, by the defendant Newcomb, as principal, and defendant Webber, as surety, to procure the release of a horse which had been seized upon two separate writs of attachment issued out of justice's court. One of the attachment suits was begun by the plaintiff, Preston, against Joseph T. Webber, the other by the Michigan Clothing Company against the same defendant, both of which suits proceeded to judgment. The condition in each bond was that: "If in a suit to be brought on this obligation within three months from the date hereof the said Cassius C. Newcomb shall establish that he was the owner of the said above goods and chattels at the time of said seizure; and in case of his failure to do so if the said Cassius C. Newcomb shall pay the value of such goods and chattels with interest to the said plaintiff, then this obligation to be void," etc.

Prior to the institution of this suit, the bond to the Michigan Clothing Company was assigned to the plaintiff, Preston.

The defendants waived the plea of the general issue, and claimed the benefit of circuit court rule 24 in the opening and closing and the introduction of testimony in the cause. Defendants claimed title to the horse under and by virtue of certain bankruptcy proceedings against Joseph T. Webber in the United States district court for the western district of Michigan, resulting in the final discharge of the bankrupt on February 10, 1903. Upon a regular ⁵¹⁴ sale of the bankrupt's effects, the horse in question was sold to, and on September 8, 1902, regularly conveyed by bill of sale to, the defendant Newcomb, "subject to the encumbrances running to C. C. Newcomb and S. W. Webber & Co."

The indebtedness of Joseph T. Webber to Preston, which was the basis of his attachment suit, was released by Webber's discharge in the bankruptcy proceedings, but was afterward revived by Webber giving his note therefor, upon which the judgment was rendered. The indebtedness of the bankrupt to the Michigan Clothing Company, upon which its judgment in the attachment cause was based, was incurred after his discharge.

Defendant Newcomb, after proving the bankruptcy proceedings, among other things, put in evidence a written agreement dated September 11, 1902, and signed by C. C. Newcomb and Joe T. Webber, whereby it was agreed that said Webber, on certain terms and conditions, should look after and care for the horse, and the horse was attached in his possession.

The plaintiff put in evidence, against numerous objections, tending to show that no indebtedness really existed between Joseph T. Webber and Newcomb, but that Newcomb's notes and mortgages were fraudulent and intended as a cover to protect Webber, and he really purchased at the sale in bankruptcy as a trustee for Webber and not as a purchaser in good faith. It was conceded that the decree in bankruptcy could not be questioned, but plaintiff claimed and was granted the right "Not only to show what the facts were so far as the possession and handling of the property sold at bankrupt sale to Newcomb subsequent to said sale was concerned, but also to examine into the real bona fides of the alleged indebtedness from Webber to Newcomb under the note and chattel mortgages involved in this cause, not for the purpose of attacking the bankrupt sale but as bearing upon the relations between Webber and Newcomb and as shedding a flood of light upon the dealings between Webber and Newcomb subsequent to said sale."

⁵¹⁵ The court charged the jury, among other things, as follows: "This court has no power or right to set aside that sale, even if it should discover that fraud had taken place. But if you should discover that there was any fraud, or that the property was disposed of to Newcomb and he taking it in trust for the benefit of Webber, that is a circumstance you may take into consideration together with all the other facts in the case in order to determine whether a year and a half later, in March, 1904, the title was really in him in good faith, or whether he was holding it in trust and the real title in

Webber—the property being in his possession—whether it was for the benefit of Webber or not, that may be taken as a circumstance.”

Plaintiff's counsel were also permitted to show, against defendants' objections, the conduct and statements of Webber, after the sale of the horse, as to the stock of goods and other property as to which there was no evidence that defendant Newcomb had any knowledge whatever. The jury, having found a verdict in favor of plaintiff, defendants have removed the record to this court for review upon numerous assignments of errors.

We are of the opinion that the court erred in permitting evidence to be introduced tending to show fraud in the purchase of the horse at the sale in bankruptcy, and that defendant Newcomb really took title as a trustee for Webber, and not as a good faith purchaser.

“An adjudication in bankruptcy partakes in part of the nature of a judgment in rem, and in part of the nature of a judgment in personam. With regard to the estate of the bankrupt debtor, which has been by the court's warrant of seizure, or by the surrender of the debtor, brought within the possession and jurisdiction of the court, its orders, decrees and judgments as to the right and title to the property, or as to the disposition of it among the parties interested, are binding upon all persons and in every court. As a determination of the legal status of the bankrupt, or of the relations of the creditors to both, its judgment is conclusive in all courts where it is pleaded”: *Abendroth v. Van Dolsen*, 131 U. S. 66, 9 Sup. Ct. Rep. 619, 33 L. ed. 57.

⁵¹⁶ See, also, *Michaels v. Post*, 21 Wall. (U. S.) 398, 22 L. ed. 520; *Sloan v. Lewis*, 22 Wall. (U. S.) 150, 22 L. ed. 832; *Benedict v. Smith*, 48 Mich. 593, 12 N. W. 866.

The decree of the federal court was treated by court and counsel as conclusive of the title of Newcomb to the horse under the bill of sale as against collateral attack in any other court or proceedings, but it was sought to avoid the effect of the bankruptcy proceedings by showing that Newcomb's title was obtained by fraud and in reality was not what the record declared it to be. The plaintiff, Preston, was a party to the bankruptcy proceedings, and, as to his individual indebtedness, was bound by the adjudication in those proceedings. Furthermore, he recognized the validity of the proceedings and the discharge of his claim and took

a note to revive the same after the title to the horse had passed to Newcomb. The indebtedness of the Michigan Clothing Company having entirely accrued after the conclusion of the bankruptcy proceedings, no pre-existing right of such company was affected by the adjudication, and it, therefore, is not in position to call it in question.

Defendant showed an unassailable title in the first instance, under the bankruptcy proceedings. He further showed, by written agreement, the execution of which was not controverted, that Webber held the horse in recognition of his ownership, and until this showing was met by evidence tending to prove that he had parted with his title after he acquired it, he had sustained the burden of proof upon his part and was entitled to the horse.

Statements of Joseph T. Webber, as to the title to the horse or other property or the validity of defendant's claims, not made in the presence of defendant or brought to his knowledge, were not competent and should not have been received in evidence.

Judgment reversed and a new trial granted.

Montgomery, Ostrander, Hooker and Moore, JJ., concurred.

As to the Conclusiveness of the Judgments and orders of bankruptcy courts, see the note to Morrill v. Morrill, 23 Am. St. Rep. 112.

CLEMENT v. ROMMECK.

[149 Mich. 595, 113 N. W. 286.]

SALES OF DANGEROUS ARTICLES—Liability of Retailer.—

A merchant who buys in the open market stove polish which purports to be safe and proper for use, and sells it at retail for a purpose for which it is apparently intended, is not liable, in the absence of negligence, if it turn out that the article is not adapted to the use, and causes injury by reason of its explosive nature. (p. 697.)

J. H. Pound, for the appellant.

⁵⁹⁵ MONTGOMERY, J. This case was brought to recover damages for an injury sustained by plaintiff while using a stove polish manufactured by defendant Crosby &

Co., and sold to plaintiff by defendant Rommeck. Both defendants demurred to the plaintiff's declaration. The demurrer was sustained as to defendant Rommeck and overruled as to defendant Crosby & Co. Crosby & Co. brought the case here and the order overruling its demurrer was sustained: *Clement v. Crosby & Co.*, 148 Mich. 293, 111 N. W. 745, 10 L. R. A., N. S., 589. The plaintiff has now brought the case here to review the order and judgment sustaining the demurrer of defendant Rommeck.

The declaration alleges that plaintiff is by occupation a housekeeper, and, having occasion to polish up her gas range, did so with a preparation she had been solicited to buy from defendants. The declaration alleges that the ⁵⁹⁶ preparation was "compounded, made, prepared, and put upon the public market in Detroit by a corporation known as Crosby & Co., one of the defendants herein, and upon which product defendants invited public use by the following solicitations, which they placed upon the goods when prepared for sale in the open market." (Here follows the recommendation of the preparation for use when polishing gas ranges, stoves, etc.)

The declaration avers that the preparation was sold to her agent by the defendant Rommeck without any warning of the dangerous nature of the preparation; that as a matter of fact it is a highly inflammable, volatile, and dangerous mixture, liable to ignite by spontaneous combustion, and that as a matter of fact it did ignite when being properly used, and caused serious injury to plaintiff.

The duty that is averred in the declaration is as follows: "It then and there became the duty of the defendants, and each of them, to know the property and properties of the goods manufactured and sold by them, and that they should not manufacture and sell, both or either of them, dangerous and highly inflammable substances," etc.

The plaintiff averred that she was in nowise negligent in the use of said product or of the said product of the defendant, known as Crosby & Co., a Michigan corporation, and known and called "6—5—4," which it manufactures, and which was sold to her in the ordinary course of trade by the defendant Arthur O. G. Rommeck, and that she, plaintiff, was in nowise blamable for her own injuries, but she now here avers and charges the fact to be that the negligence, carelessness and wrongdoing of the defendants in the manufacture and placing upon the public market for sale without

notice of its dangers of such a highly inflammable and dangerous product as the composition known as 6—5—4 is and proved itself to be to plaintiff without any warning of its dangerous qualities and characteristics, and the said article being sold in the open ⁵⁹⁷ market was and is the direct cause of the plaintiff's injuries.

It is manifest from a reading of this declaration that the theory fairly to be deduced from it is that, though the defendant Rommeck bought the preparation from Crosby & Co. properly labeled in the open market and sold it in the open market, the positive duty rested upon him to know the property of the goods and their inflammable nature, and to communicate the facts to the purchaser. It is to be noted that the declaration contains no averment that the defendant Rommeck had actual knowledge of the inflammable nature of the goods, nor is it averred in what manner he was negligent in not knowing their inflammable nature. It gets down to this, whether a dealer, a hardware merchant, for example, who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended, is liable, in the absence of negligence, if it turn out that the article is not adapted to the use, and causes injury.

We think it clear upon principle that no such liability exists. It is sought to liken the case to the sale of an article of food in which it is held that the sale to the consumer carries with it an implied warranty of the wholesomeness of the food: *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; *Hoover v. Peters*, 18 Mich. 51. We are not aware that the rule of these cases has been extended to the sale of commodities like stove polish. On the contrary, we think that the principle stated in *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392, is analogous, and that negligence must of necessity be the basis of an action in such a case. The plaintiff may in such case proceed against the manufacturer, as we held in *Crosby's case* (148 Mich. 293, 111 N. W. 745, 10 L. R. A., N. S., 589).

Judgment is affirmed, with costs.

Carpenter, Grant, Blair and Ostrander, JJ., concurred.

Authorities upon the Question Involved in the principal case will be found in the notes to *Woodward v. Miller*, 100 Am. St. Rep. 192; *Kuelling v. Lean Mfg. Co.*, 111 Am. St. Rep. 701; *Gold Ridge Min. Co. v. Tallmadge*, 102 Am. St. Rep. 607.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

**TEMPLE v. McCOMB CITY ELECTRIC LIGHT AND
POWER COMPANY.**

[89 Miss. 1, 42 South. 874.]

ELECTRIC LIGHT COMPANIES—Liability to Children.—If a boy climbs into a tree, through the branches of which an uninsulated electric wire has been placed by an electric light company, and he is injured by coming in contact with such wire, the company is liable therefor, when the tree is such as any small boy would be attracted to and use in his play. (p. 699.)

ELECTRIC LIGHT COMPANIES—Negligence—Duty Toward Children.—The immemorial habit of small boys to climb small trees filled with abundant branches reaching almost to the ground is a habit of which electric corporations stretching their wires over such trees must take notice. (p. 699.)

Quinn & Williams and F. H. Lotterhos, for the appellant.

Miron & Butler, for the appellee.

7 **WHITFIELD, C. J.** The citizens of a municipality have the right to the reasonable use of the streets, not only on their surface, but above their surface. Many uses of the streets, or the spaces above the streets, may be readily imagined in cities, where buildings are erected twenty to fifty stories high, that might not be available in an ordinary town. The corporations handling the dangerous agency of electricity are bound, and justly bound, to the very highest measure of skill and care in dealing with these deadly agencies. The appellee had the right to such reasonable use of the streets for its poles and wires as the conditions existing at the time in the community warranted. On the other hand, the appellant had the reciprocal right to what was a reasonable use of

the streets on his part. The rights of the appellant and the appellee are mutual and reciprocal. Neither could so use his own rights as to wantonly injure the other. These two correlative rights, if the law is obeyed, operate in perfect harmony with each other. There are no interferences, and no vacancies in the sphere of their harmonious movement.

The declaration shows that the tree in which this boy was injured, by contact with an uninsulated wire, was an oak tree, a little tree abounding in branches extending almost to the ground—just such a tree as the small boys of any community would be attracted to, and use, in their play. Whether this appellee knew that this particular small boy was in the habit of climbing this tree or not it is clear from the averments of the declaration that it did know the tree, the kind of tree, and, knowing that, knew ^s what any person of practical common sense would know—that it was just the kind of a tree that children might climb into to play in the branches. It is perfectly idle for the appellee to insist that it was not bound to have reasonably expected the small boys of the neighborhood to climb that sort of tree. The fact that such boy would, in all probability, climb that particular tree, being the kind of tree it was, was a fact which, according to every sound principle of law and common sense, this corporation must have anticipated. The argument that it did not almost suggests the query whether the individuals composing this corporation, its employes and agents, had forgotten that they were once small boys themselves. The immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit of which corporations stretching their wires over such trees must take notice. This court, so far as the exertion of its power in a legitimate way is concerned, intends to exert that power so as to secure, at the hands of these public utility corporations, handling and controlling these extraordinarily dangerous agencies, the very highest degree of skill and care.

The judgment of the court below is reversed, the demurrer overruled, and the cause remanded.

The Duty and Liability of Electric Companies in maintaining their wires are discussed in the note to *Herbert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 515. As to whether they are liable to licensees and trespassers who come in contact with uninsulated or broken wires, see *Guinn v. Delaware etc. Tel. Co.*, 72 N. J. L. 276, 111 Am. St. Rep. 668; *Cumberland Tel. etc. Co. v. Martin*, 116 Ky. 554, 105 Am. St. Rep. 229.

WATTS v. AINSWORTH.

[89 Miss. 40, 42 South. 672.]

SALES, CONDITIONAL—Remedy of Seller on Resale.—If the buyer of an animal gives as part of the purchase price a note stipulating that such animal shall remain the property of the seller until paid for, and the buyer is not engaged in the business of buying and selling such animals, and the seller did not sell to him for resale, nor authorize him to resell, the seller is not estopped from asserting title to the animal until the purchase price is paid, both as against the buyer and anyone claiming under him. (p. 701.)

CONDITIONAL SALES—Estoppel—Evidence—Declarations.—If a seller, in a conditional sale, is not estopped from asserting title, both as against the buyer and those claiming under him, evidence of a conversation between the seller and a third person, who had previously bought from the buyer and sold to the defendant, with respect to the balance due on the purchase price, is not admissible in an action by the seller to recover the goods sold. (pp. 701, 702.)

Ainsworth, the plaintiff, sued out a writ of replevin for a mule against the defendant Watts. On the trial the case went against plaintiff, who appealed to the circuit court and recovered judgment for the return of the mule or the value thereof. The mule had formerly been sold by plaintiff to one Fletcher, who gave the following note for part of the purchase price: "On demand and after date, for value received. I promise to pay W. M. Ainsworth two hundred and 00/100 dollars, said two hundred and 00/100 dollars being the purchase money for one light blue mule, about five years old, about fifteen hands high, and one bay horse mule, about six years old, and about fifteen and one-half hands high, said above-described light blue mare mule, and bay horse mule to remain the property of the said W. M. Ainsworth until paid for in full, with interest from date at the rate of ten per cent per annum. It is further agreed that if I sell, trade, or otherwise dispose of the above-described mules, or either of them, this note becomes immediately due and payable." Fletcher sold the mule in question to one Nix, telling him at the time that there was a balance due thereon. Nix afterward sold it to one Oscar Watts, who in turn sold it to the appellant, Watts, who claimed that at the time he purchased the mule, he knew of no claim by the appellee, Ainsworth, against it. The court excluded testimony offered by Nix in respect to a conversation had between him and Ainsworth as to the balance due on the mule after the sale to the appellant had been consummated.

Longino, Willing & Wilson, for the appellant.

J. S. Sexton, for the appellee.

⁴² MAYES, J. This case is differentiated from the case of *Columbus Buggy Co. v. Turley*, 73 Miss. 529, 55 Am. St. Rep. 550, 19 South. 232, 32 L. R. A. 260. In the case, *supra*, the Columbus Buggy Company sold to one Smitha, a trader, being actively engaged in the business of hiring and selling carriages and buggies, and being given in the contract itself authority to sell the articles sent to him by the Columbus Buggy Company. Smitha sold some of the buggies to Turley in satisfaction of a debt he owed him, and the Columbus Buggy Company brought an action in replevin for the vehicles, claiming that they had reserved title in themselves; and the court, in passing on the question, says: "What effect shall be given these inconsistent terms, when the buyer is not only apparently clothed with all the indicia of ownership, but when, by the contract itself, the *jus disponendi* is unequivocally conferred on the buyer? It would seem that only one answer can be returned to these questions. To permit the vendor in a conditional sale of personal property, bought in the course of trade for resale, to retain title and at the same time authorize the buyer to resell, would operate as a fraud upon innocent purchasers": *Columbus Buggy Co. v. Turley*, 73 Miss. 537, 55 Am. St. Rep. 550, 19 South. 233, 32 L. R. A. 260. In the note given in this case, no right of sale is given, but by express terms the note is made to fall due in case the vendee makes a sale of the property, trade or otherwise disposes of same. Mr. Ainsworth states that he did not authorize Mr. Fletcher to make a sale, and the testimony of the other witnesses in the case fails to show that any sale was ever authorized by Mr. Ainsworth. It is not shown that Fletcher was engaged in the business of selling horses and mules, and that Mr. Ainsworth knew this and sold to him for purposes of resale. ⁴³ This being the case, he does not bring himself within that rule which estops the vendor in a conditional sale, reserving title in himself, from asserting his title both as against his immediate vendee and any purchaser from him.

It was not error for the court to exclude the testimony of Mr. Nix as to a conversation he had with Mr. Ainsworth after he bought the animal in question. He had acted, and bought, before he saw Ainsworth, and at that time Ainsworth told him

that there was a balance, but did not tell him how much, and Mr. Nix says he did not ask him. In all the cases which hold that a party selling goods is estopped to deny that title passed, on examination it will be seen that the party selling actually or constructively knew that they were to be sold by the purchaser and acquiesced therein. In the case of *Parry Mfg. Co. v. Lowenburg*, 88 Miss. 532, 41 South. 65, vehicles were sold under a contract reserving title, but giving the purchaser power to dispose of them, and the court held that such a contract could not be upheld as against a bona fide purchaser. In the case of *Lewenberg v. Hayes*, 91 Me. 104, 64 Am. St. Rep. 215, 39 Atl. 469, this same distinction is made. Affirmed.

When Goods are Sold under a contract which reserves title in the vendor until the purchase price is paid, a bona fide purchaser from the vendee usually acquires no title: *Triplett v. Mansur etc. Imp. Co.*, 68 Ark. 230, 82 Am. St. Rep. 284. The rule seems to be otherwise, however, where the vendor knows that the vendee intends, when he is making the purchase, to put the goods on sale: *Lewenberg v. Hayes*, 91 Me. 104, 64 Am. St. Rep. 215; *Eisenberg v. Nichols*, 22 Wash. 70, 79 Am. St. Rep. 917.

CUMBERLAND TELEGRAPH AND TELEPHONE COMPANY v. HOBART.

[89 Miss. 252, 42 South. 349.]

TELEPHONE COMPANIES—Nonpayment of Dues—Duty to Furnish Service.—If a telephone company cuts out a subscriber for nonpayment of dues on one contract of service, it must reinstate that service for him upon tender of the amount due, and it cannot coerce payment of the amount due on another and separate contract for telephone service with his wife by demanding that that amount be paid before it will reinstate the other service. (p. 705.)

TELEPHONE COMPANIES—Wrongful Refusal of Service—Damages.—If a telephone company cuts out a subscriber and wrongfully refuses to reinstate the service for him, it is liable not only for actual damages, but also for reasonable damages for the inconvenience and annoyance caused him in being wrongfully deprived of the use of the telephone. (pp. 706, 707.)

Smith, Hirsh & Landau, for the appellant.

Bryson & Dabney, for the appellee.

256 MAYES, J. Hobart sued the Cumberland Telegraph and Telephone Company for the sum of two thousand dollars

damages for wrongfully cutting out his telephone. The facts in the case are as follows: Hobart resided about a mile and a half from Vicksburg, on what is known as the "Warrenton Road." He had entered into a contract for a telephone to be put into his residence some years previous to the date at which this suit was brought, and subsequently, his wife having a store, he saw the manager of the telephone company, and asked him to place a telephone in this store, ²⁵⁷ which the company did. At the time the company's servants went out to place the telephone in the storehouse of his wife, Hobart himself was not present, and the telephone company, presenting a contract to be signed, the clerk in the store signed it in the name of Mrs. Hobart, so that the telephone company had a contract with Hobart for the telephone in his residence, and a contract with Mrs. Hobart, signed for her by the clerk, for the telephone in the store. It is stated in the testimony that the telephone company believed that the contract was signed by Hobart, he having spoken to the company about it, and that the charge for rent of the telephone in the store was placed on the books to Hobart, though the written contract was in the name of his wife, so far as the store was concerned. About a month after the telephone had been placed in the store Mrs. Hobart sold the store, and Hobart states that, when the store was sold, he notified the telephone company to take the telephone out of the store. Sometime in July, 1905, Hobart was away from home four or five days on his plantation in Louisiana, and returning about the 15th or 16th, he found his residence telephone cut out. He rang up the company's office and asked what was the matter, and appellant told him he was cut out, and the party that answered the telephone said "they knew all about him, and that his telephone would not be put back on the line." Hobart had not paid rental for his telephone for the month of June, and on the 15th or 16th of July he was cut out. It also seems that there was some three dollars and ten cents due on the contract of Mrs. Hobart for the telephone in the store. The next morning Hobart went into Vicksburg and into the manager's office of the telephone company, tendered his rental for the month of June, and asked to be put back on the line. This the manager declined to do because the company claimed he owed three dollars and ten cents on the store telephone. Hobart told them that he did not owe for the telephone in the store, that it was his wife's contract; the store belonged to her,

and if she owed anything to present her ²⁵⁸ the bill. He tendered to them the two dollars for the rental for the month of June due by himself on his residence telephone, and two dollars in advance for the next month, and requested reinstatement of the service, but the company declined to accept it because he would not pay the full amount, as it claimed; that is to say, both under his wife's contract and his own, so that when it declined to reinstate his telephone it had full knowledge that the three dollars and ten cents was the debt of Mrs. Hobart. Appellant sent out a lineman, and cut out the telephone, and removed it from Hobart's residence. Hobart says that when they came to remove the 'phone he tendered them six dollars, paying in advance for the residence telephone, which they declined to accept. He was without a telephone for three or four months, under these circumstances. Hobart claims to have been damaged in many ways by the removal of the telephone, but that it is difficult to enumerate the exact amount, and the ways in which he was damaged

That he lived out in the country, and that it was an almost indispensable adjunct to his household, and yet difficult to enumerate in dollars and cents; that when he was in town and wanted anything, he could telephone. When he wanted to send things home, he was in the habit of putting them on the car and telephoning some one at the house to meet the car and get the things; that after the telephone was cut out he could not do this, but had to send a boy; that he suffered inconvenience and annoyance in ways too numerous to name, and too difficult to put in dollars and cents, and that the telephone was a necessity to him. He used the telephone on his place in Louisiana, and he used it as a matter of convenience to talk with his home. While he was without the telephone he was taken sick, and suffered great annoyance and inconvenience in not having a telephone in his house; that, to his recollection, he spent twenty-five dollars to thirty dollars for messengers to send things home; that when he had long-distance calls several times, he would have to go out at night to his neighbor's house to talk, and when his family was sick he was ²⁵⁹ put to much inconvenience, and deprived of the protection which the telephone gave him at his house. The case was submitted to the jury on these facts, and they awarded damage in the sum of one hundred and fifty dollars. The record clearly shows that there were two distinct contracts, one by Hobart for the telephone in his dwelling, and

another contract in the name of Mrs. Hobart for the telephone in her store.

It is attempted to be shown that the telephone company thought it was making the contract at the store with Hobart, instead of Mrs. Hobart, but that can make no difference in the decision of this case, for the reason that the contracts were separate contracts relating to different properties, and, again, appellant was informed that it was Mrs. Hobart's contract after appellant had cut out the residence, and, again, the personnel of the party contracted with could make no difference, for the reason that it was bound to put in the telephone in the store at the request of either Mr. or Mrs. Hobart. These contracts were separate and independent contracts, having no relation with each other, and because of the failure to pay charges on one of the telephones, the telephone company had no right to cut out the other. In the first place, they were contracts between different parties; in the next place, if this were not true, they were separate contracts about different properties, and the telephone company could only cut out that telephone for which there had been a default in payment. At the time that Hobart's telephone was cut out he was in default on his residence, and the telephone company had the right to cut him out, after due notice to him, but when he tendered the money properly due on the telephone in his dwelling, it had no right to undertake to coerce payment of the amount due on the other telephone by refusing to reinstate the service in his house. In the first place, he did not owe it; it was his wife's debt. And in the next place, if he had owed it, it was a separate contract, and appellant could only put an end to the particular contract wherein there ²⁶⁰ was default. In the case of *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468, 40 South. 820, Whitfield, C. J., says: "If gas is supplied to the owner of different houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of the gas from the other": *Gaslight Co. v. Colliday*, 25 Md. 1; *Lloyd v. Washington Gaslight Co.*, 1 Mackey (D. C.), 331. Gas companies and telephone companies, being public service corporations, are controlled by the same principles of law. It is shown by the testimony that the telephone company was fully notified that the amount of three dollars and ten cents was the amount due on Mrs. Hobart's telephone, and for which she was liable; yet, notwithstanding this, it cut out

the telephone in the dwelling anyway, which was unwarranted. A telephone company may cut out a subscriber for nonpayment of dues on reasonable notice, when the dues are not actually paid, but when they are paid, or when they are offered to be paid, it acts at its risk in refusing reinstatement of service when requested so to do.

The only other question necessary for us to consider is the question of the amount of damages. The jury in this case allowed the sum of one hundred and fifty dollars, and we cannot say that their judgment was wrong in this matter. The law of damages, and what is proper to be allowed, must largely depend upon the nature of the suit in which damage is sought to be recovered. It was impossible for Hobart to itemize each separate item of damage occasioned him by the removal of his telephone. The difficulty in doing this is manifest to everyone. The telephone has come to be a necessity. It is the thing which completes the use of a home. It is resorted to daily, and hourly, to such an extent as to be regarded as indispensable, yet, when it comes to taking pencil and paper and calculating day by day what pecuniary value it possesses, it is almost impossible. The inconvenience, the annoyance, and the trouble of being without one is a damage which no one can accurately estimate. It is such inconvenience ²⁶¹ and annoyance as is only to be fully appreciated when one is deprived of its use; its loss is a great and distinct damage, yet such damage as is not susceptible of exact measurement. When the telephone company undertook to cut out the residence telephone because of the nonpayment of rent, Hobart was in default, and it had the right to do it. When appellant declined to reinstate it after having been offered the rental of the telephone in the dwelling-house, it was its duty to reinstate it, and not having done so, it should compensate Hobart for his pecuniary loss, and such inconvenience and annoyance in being wrongfully deprived of its use, as the jury thought proper under the facts. We do not say that damage for inconvenience and annoyance may be recovered in all cases, but from the very nature of the subject matter of this litigation, annoyance and inconvenience is one of the main elements of damages. In the case of *Hewlett v. George*, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682, this court held that "compensatory damages are not necessarily limited to actual money losses." Again, in the case of *Alabama & V. Ry. Co. v. Bloom*, 71 Miss. 247, 15 South. 72, the

court held that damage for discomfort and inconvenience might properly be considered as compensatory damages.

In the case of *Shepard v. Milwaukee Gaslight Co.*, 15 Wis. 318, 82 Am. Dec. 679, when the question as to damage was that of compensation merely, the court said: "But it is said that the court erred in the rule of damages. It told the jury that 'the plaintiff, if entitled to a verdict, should have such damages as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business arising out of the defendant's refusal to furnish gas to the plaintiff.' It is claimed that this instruction gave the plaintiff punitive or vindictive damages. But, we think, this is clearly not so. The inconvenience and annoyance occasioned directly by the wrongful act or refusal of the defendant are always legitimate items in estimating the damages in actions ²⁶² of this kind. Vindictive damages are those which are given over and above all this as punishment for the other party. In actions for a nuisance, the damage usually consists almost entirely in inconvenience and annoyance. So, also, in many other actions of tort. In *Ives v. Humphreys*, 1 E. D. Smith, 201, the court says: 'Even if the plaintiff be confined strictly to compensation for the injuries sustained by him, the jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, insult, invasion of the privacy, and interference with the comfort of the plaintiff and his family.' And again: 'For an involuntary trespass, or a trespass committed under an honest mistake, the damages should be confined to compensation for the injury sustained by the plaintiff, and in estimating the amount of such damages, all of the particulars wherein the plaintiff is aggrieved may be considered, whether pecuniary loss, or pain, or insult, or inconvenience.' " We quote this case with approval as applied to this class of cases. When the telephone company undertakes to cut out its subscribers for debts which it claims to be due it, it may do so if the subscriber actually owes it, but if the subscriber is not indebted to it, it is liable for such actual damage, inconvenience and annoyance as is occasioned him by its wrongfully cutting out his telephone.

The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. That a person deprived of the use of a telephone is materially damaged, all will concede. What is the amount of dam-

age in dollars and cents cannot be accurately stated by the party suing, for the reason that his damage consists not only in pecuniary losses, but it consists in inconvenience, discomfort and an annoyance, and it must be left to the jury to determine what is the damage sustained, taking into consideration the discomfort, the annoyance and inconvenience suffered, together with actual pecuniary losses. Would it be contended if one's gas is wrongfully ²⁶³ cut off that compensatory damage would be only what it would cost to buy tallow candles? To so hold, and to hold that annoyance, discomfort and inconvenience was not a proper element of damage to be considered by a jury when the services of a telephone has been wrongfully discontinued, would be to place the public at the mercy of the telephone company, and force them to yield to many unjust demands rather than contest, for fear of a discontinuance of the service. Such coercive powers cannot be sanctioned.

We would unhesitatingly set aside a verdict of the jury where the amount allowed was grossly excessive or unreasonable, but we shall be slow to interfere with their judgment when it is not so. The telephone may be considered a necessary household utility, so much so that the thought of losing it will coerce almost anyone into payment of any debt claimed within reason rather than have it cut out. It is a public service corporation without competition, monopolistic in nature, and the patrons have no choice but to accept its service, and they have not the privilege of selecting to do business with a competitor, because there is no competitor, and for this reason the rights of the public should be carefully guarded against oppressive methods used for the purpose of collecting unjust demands. The necessities of the law must meet modern conditions.

The action of the telephone company was wrong, and it was not necessary for Mr. Hobart to pay the wrongfully demanded bill for the purpose of retaining the telephone in his dwelling. If he had done this, it would have been necessary for him to sue for the recovery of the amount overpaid, and to require him to do this, in the language of the case of *Wood v. Auburn* (Me.), 32 Atl. 908, 29 L. R. A. 377, "would be a violation of the fundamental juristic principle of procedure. That principle is that the claimant, not the defendant, shall resort to judicial process." This case is in perfect accord with the case of *Cumberland Telephone &*

T. Co. v. Baker, 85 Miss. 486, 37 South. 1012. ²⁶⁴ In that case the telephone company had rendered the service, and the rental was properly due from Mr. Baker, but he claimed an unliquidated amount as damage for poor service, and paid his bill less the amount so claimed by him, whereupon his telephone was discontinued, and the court held that he was not entitled to exemplary damages.

We can find no reversible error in this cause.

Affirmed.

A Telephone Company cannot, as a condition precedent to furnishing an applicant telephone facilities, require him to stipulate that he will use the system of that company exclusively: *State v. Citizens' Tel. Co.*, 61 S. C. 83, 85 Am. St. Rep. 870. And a rule of a water company that it will shut off the water from customers in all cases of nonpayment of water rents is unreasonable and void, if so construed as to permit the water to be shut off because a former occupant has not paid his bill: *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432; *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468; *Linne v. Bredes*, 43 Wash. 540, 117 Am. St. Rep. 1068.

The Measure of Damages against a telephone company for refusing to render service at the request of a customer is discussed in *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 104 Am. St. Rep. 819; *Cumberland Tel. etc. Co. v. Hendon*, 114 Ky. 501, 102 Am. St. Rep. 290.

HALL v. EASTMAN, GARDINER & COMPANY.

[89 Miss. 588, 43 South. 2.]

STANDING TIMBER SALES—Time in Which to Remove.—

Under a deed to the standing timber on separate tracts of land providing that it shall remain in force as to each separate tract until one year after the vendee begins to cut timber therefrom, he is required to begin cutting within a reasonable time, as shown by the evidence, after the execution of the deed, notwithstanding that it grants a right of way, unlimited as to time, over all the separate tracts of land, for the removal of the timber therefrom, and from the adjacent lands of the purchaser. (pp. 712, 713.)

The bill in this case charged that defendant had taken no steps, for more than five years after the execution of the deed set out in the opinion, toward cutting or removing the timber from the land. That complainants desired to cultivate the premises, but could not do so, because of the standing timber thereon and defendant's refusal to remove it, and that, as the defendant claimed an unlimited time in

which to remove the timber, the bill prayed for a cancellation of the deed and defendant's claim to the timber, or, in the alternative, that the court should fix a time within which the timber must be removed.

A decree was entered in the trial court, sustaining a demurrer to the bill and dismissing the suit, and complainants appealed.

Longingo, Willing & Wilson, for the appellants.

Shannon & Street, Green & Green and Mayes & Longstreet, for the appellee.

608 WHITFIELD, C. J. The instrument to be interpreted in this case is as follows:

"In consideration of sixty-seven dollars and fifty cents (\$67.50) to us paid, the receipt whereof is hereby acknowledged, we do hereby grant, sell, convey, and warrant to Eastman, Gardiner & Company, a corporation, its successors and assigns all of the timber now or hereafter growing, standing, lying, or being on the following described land, situated in the county of Simpson, State of Mississippi, and described as follows: The southwest 1/4 of northeast 1/4, section twenty-five, township 10, range 17 west—together with the right, at any and all times from the date hereof, of egress and ingress upon said land to cut down and remove said timber therefrom; and do also grant to said Eastman, Gardiner & Company, or its successors and assigns, for the consideration aforesaid, the right of way over, through, and across said property, or any part thereof, to construct, maintain, and use logging railways or tram roads or dirt roads, with the right to construct, maintain, and use spur tracks or roads over, through, and across said lands continuously for the purpose of removing the timber now owned or to be acquired by said Eastman, Gardiner & Company, or their successors or assigns, from said land and all lands adjacent 609 to the above-described lands. Eastman, Gardiner & Company, or their successors and assigns, also to have the right to erect on said lands, and to remove from said lands at any and all times, any and all buildings or other property required for logging purposes. It is especially covenanted and agreed that as to each forty-acre tract herein described and conveyed this deed shall continue and remain in force until said Eastman, Gardiner & Company, their successors and assigns, commence to cut and lumber the same, and for one

year thereafter, and then to become void and of no effect; but the right of way of said Eastman, Gardiner & Company, their successors and assigns, for railways or tram roads or dirt roads, whether main or spur tracks or roads, shall remain in full force. It is further covenanted and agreed that Eastman, Gardiner & Company, or their successors and assigns, will pay the taxes on the land from the date hereof until the timber is removed.

“Witness our signature, this 21st day of March, 1900.

“BUD HALL.

“MAY HALL.”

We propose to decide, in this case, nothing except what this instrument presents for decision. This is not the case of a grant by A, owning both the land and the timber thereon, of the timber in fee simple, without qualification. We will construe that sort of instrument when the case arises. This is not the case of a deed giving the grantee “as long as he wishes” in which to move the timber; nor the case of a deed giving the grantee the right to commence cutting when he pleases. This instrument is peculiar in its terms, and express in its provisions. The special covenant contained in it controls and limits, of course, the general provision preceding. That special covenant is as follows: “It is especially covenanted and agreed that, as to each forty-acre tract herein described and conveyed, this deed shall continue and remain in force until the said Eastman, Gardiner & Company, their successors and assigns, commence to cut and lumber the same, and for one year thereafter, and then to become void and of no effect.” This is the controlling ^{§10} clause in the instrument; and it plainly means, what it expressly declares, that all the timber, whether growing, standing, lying or being on the lands described, and whether growing thereon when the instrument is made, March 21, 1900, or thereafter growing thereon, which the grantee could take in one year from that date—that is to say, could “cut and remove”—was such timber as the grantee could cut and remove in one year from the time it commenced to cut. The proposition contended for by learned counsel for appellee, that under this instrument the grantee had a fee simple title to all the timber growing on the land at the date of the instrument or growing at any time thereafter, and all such timber, whether growing, standing, lying, or being on said land, without any limit whatever, is, of course, utterly un-

tenable. Indeed, in one part of their brief learned counsel for appellee say: "We are frank to say that in our opinion this limitation is valid. It limits, in virtue of the time therein expressed, what has gone before, and, one year after Eastman, Gardiner & Company begins to cut and lumber the property, the deed by its express condition becomes void."

This concession, which is perfectly correct in sound law, contravenes completely the other contention, in another part of learned counsel's brief, that the instrument provided a grant of all the timber, without any qualification whatever. This concession also completely answers the untenable proposition that a case of forfeiture is here presented. There is no case whatever of forfeiture presented in this cause. The simple provision is that, within one year after cutting begins on each forty-acre tract, the right to cut shall cease and the conveyance become void; in other words, the instrument itself provides its own time of expiration and the contract becomes void under it. It ceases, not by forfeiture to be declared by the court, but by virtue of an express provision in the instrument itself, to wit, the provision that the instrument shall become void one year after the cutting commences. Nothing can be clearer than that this provision fixes by contract the expiration of the right of the ⁶¹¹ grantee to cut and remove timber, and that no element of forfeiture is in any way involved. Notwithstanding this concession, learned counsel say in another part of their brief that "it was expressly contracted and agreed that at any and all times appellee, its successors and assigns, could enter to cut and remove this timber, and are not restricted to any reasonable or any other time whatsoever."

Again, in other places of learned counsel's brief it is earnestly argued that the effect of the instrument is to vest an absolute fee simple title of all the timber then and there on the land, and that which may be lying, standing or being on the land, without any limitation whatever. The argument is that the grantee might commence to cut whenever he pleased, and not until he pleased, and, if he never begins, he would still own in fee all said timber, and that these rights are vested in the grantee by the terms of this instrument. Nothing could be further from the intention and purpose of the makers of this instrument as expressly set forth in the special covenant named. The grantee had purchased timber standing on a very large number of forty-acre tracts;

this case being simply a test case to determine the rights of the parties to timber on all these lands.

The plain purpose of the instrument is to give to the grantee the right to cut and remove the timber. There was not the remotest thought, on the part of either, that the grantee should have the right to the timber, the timber to be kept standing on the land forever, or indefinitely. It is made the duty of the grantee to cut and remove the timber from the land. The provisions of this instrument abound as to the right and the duty to enter and cut and remove the timber from these lands. Plainly, the purpose of the instrument was, as to each forty-acre tract, that the grantee should commence to cut and remove the timber within what would be a reasonable time, to be determined by the evidence. In determining what would be a reasonable time within which to commence cutting on one forty-acre tract, then as to what would be a reasonable time to begin cutting ⁶¹² on another forty-acre tract, the character of the land, the situation of the timber, the difficulty of access, and many other considerations, perfectly obvious, should be taken into consideration, so as to determine correctly what would be a reasonable time within which the grantee must begin to cut as to each forty-acre tract, separately considered. And what this reasonable time is the authorities abundantly show is a matter to be determined by evidence, according to the circumstances of each particular case.

Learned counsel for appellee insist that the provision in the instrument that the right of way for railroads, tramways, dirt roads, etc., over the lands described in the instrument was to remain in full force, together with the other provision that the right of way across that property for the purpose of constructing, maintaining, and using logging railways or tram roads or dirt roads, with a right to construct, maintain, and use spur tracks or roads over and across said land continuously, shows that the grantee could commence to cut whenever it pleases, even if it be for a period of time no matter how remote. This is a plain confusing of two entirely distinct things. The right of the grantee to commence to cut the timber on each forty-acre tract is one thing; the right to maintain these railroads, tram roads, dirt roads, and spur tracks, which is entirely for the purpose of transporting the timber from the lands to the mill, is another thing, and was intended to exist continuously and to remain in force for the

every reason set out in the instrument, to wit, that the grantee might not only cut the timber on these lands, but also from all lands adjacent to the above-described lands. The thought was that the grantee not only should cut and remove all the timber it could cut on each of the forty-acre tracts described in this and other kindred instruments, but that it was to have the right to keep its tramways and other roads and buildings laid down and constructed on these lands thus described in these instruments, not only until ⁶¹⁸ it cut the timber on these lands, but until it had cut the timber on all adjacent lands. The landlord could proceed to put his soil in cultivation, and, if he was to some extent inconvenienced, he had nevertheless in this instrument expressly granted the right to the grantee to maintain these roads until it cut all the timber from the adjacent lands, together with such timber as it could cut and remove from these lands, from the period of time from which it commenced to cut on each of these forty-acre tracts.

We have not been able to see how there could have been any serious difficulty in the construction of this instrument. Courts must look at the whole instrument, not at one clause. They must get the purpose from the whole instrument, and they have a right to look to the situation of the parties who made the instrument, to the subject matter embraced in the instrument, and to all the conditions surrounding the parties executing the instrument. When this is done, as it must, of course, be done to reach the true intent of the parties, all difficulty in the construction of this instrument instantly disappears. The truth is, we have had a bad wealth of learning cited by counsel on both sides in this case, which is entirely aside from any proper construction of this particular instrument which we are now interpreting. The chief difficulty which has beset the learned counsel of appellee is in stickling about the first clause in the instrument, and the whole argument is made as if there was nothing in the instrument after the description of the land; in other words, as if this were a case where A, owning the land and the timber thereon, had conveyed to B all of the timber, without any other clause in the instrument at all. If this had been the purpose of the parties, all the rest that follows the first clause might well have been omitted; and counsel argues and treats all that follows as superfluous.

Counsel cite *Robinson v. Payne*, 58 Miss. 690, a case wholly unlike this, and omit entirely to refer to *Hart v. Gardiner*, ⁶¹⁴ 74 Miss. 153, 20 South. 877, repeatedly approved since its decision, and in which the very contention which they make here now was disallowed, and in which the *Robinson-Payne* case (58 Miss. 690) was fully considered and explained. That there may be no further confusion along this line, we repeat once more, to reaffirm emphatically, the doctrine of that case, as follows: "The fault in this reasoning is that the rule has no application when the estate intended to be granted is not actually set forth in the granting clause, in words chosen by the grantor for that purpose, but is worked out by legal implication of the intent to convey a particular estate from the use of certain statutory words, and where, in addition, the estate intended to be granted is clearly shown elsewhere in the deed. The rule which required the habendum to yield to the granting clause, when repugnant intents are expressed in the two as to the estate to be conveyed, is applicable only where the intents are both the actual intents of the grantor, and not intents arising by implication of law from the use of certain words, to which the statute has affixed a certain meaning. The distinction is between the actual intent of the grantor expressed in terms of his own, selected to declare that intent, and an intent merely implied by law. And this distinction is abundantly sustained by authority. . . . To the same effect see 3 Washburn on Real Property, p. 466 et seq., especially section 61; Martindale on Conveyancing, sec. 111; Devlin on Deeds, secs. 213, 214, 216. And see, specially, the very striking case of *Henderson v. Mack*, 82 Ky. 379, where the court says: 'The proper end of all rules of construction is to effect the intention of the parties to the instrument; and the intention of a grantor in a deed is to govern when it can be ascertained, equally as in the case of other instruments. In arriving at it, the entire paper must be considered. Blackstone says that the construction 'must be made upon the entire deed, and not entirely upon disjointed parts of it.' If clauses are repugnant to each other, they must be reconciled, if ⁶¹⁵ possible; and the intent, and not the words, is the principal thing to be regarded. The technical rules of construction are not to be resorted to, when the meaning of the party is plain and obvious. As was well said in *Robinson v. Payne*, 58 Miss. 692: 'The intention must prevail.' "

This last-quoted clause shows that the *Robinson-Payne* case

announces the same rule we announced in *Hart v. Gardiner*, 74 Miss. 153, 20 South. 877, to wit: "The intention must prevail."

In view of these authorities, and many others which might be multiplied, it is obvious that the special covenant that we have heretofore considered limits the first clause in the instrument, and that the real purpose here was to give to the grantee the right only to all such timber as had been theretofore described, which the grantee might cut and remove from each forty acres within one year from the time it commenced to cut on each forty acres separately dealt with. The timber thereafter growing meant the timber thereafter growing within the life of the contract; that is, growing from the date of the instrument to the end of one year from the time appellee began to cut. The opposite construction results in the utterly incongruous holding that the grantee had the right to commence to cut whenever it pleased, even if that was forever, and then, after it commenced cutting, one year more; in other words, that it had forever, plus one year besides forever, in which to commence to cut. Assuredly, it ought to need no authority to show that this construction cannot be possibly maintained. This instrument by its own terms, by this special covenant hereinbefore referred to, shows beyond the possibility of doubt that the grantee must begin to cut the timber within a reasonable time, treating each forty-acre tract separately. It is not a case, as we have stated before, of a plain grant by A, who owned the lands and the timber, to be of the timber, but nothing more; but it is a case of a grant by A to B of the timber, with an express direction ⁶¹⁶ that he shall remove the timber, and that he is entitled only to what he shall cut and remove within one year from the time he begins to cut, which means, of course, that he must begin to cut within a reasonable time. This view of the terms of the instrument is abundantly supported by many cases selected with great care by the learned counsel for appellants.

We refer to only a few, which we regard as conclusive of the subject: *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Mathews v. Mulvey*, 38 Minn. 342, 37 N. W. 794; *Pease v. Gibson*, 6 Me. 81; *Ferguson v. Arthur*, 128 Mich. 297, 87 N. W. 259. And most especially see the case of *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, in which case the instrument, like the instrument here, contained provisions from which it was plain that the intent was

that the cutting should commence within a reasonable time; in other words, that case, like this, falls within the class of cases in which the instrument, by express provision, shows the intent to have been that the cutting should commence within a reasonable time: See, also, *Perkins v. Peterson*, 110 Ga. 24, 35 S. E. 319. The case referred to of *Pease v. Gibson*, 6 Me. 81, contains language so pertinent that we quote it to approve it: "To admit the construction given by the defendant's counsel, and consider such a permission as a sale of the trees, to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation, in point of time, specified in the permit, would be highly injurious in its consequence. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury; and, in fact, it would amount to an indefinite permission. The purchaser, on this principle, might by gradually cutting the trees and clearing them away, make room for a succeeding growth, and, before he had removed the trees standing on the land at the time of receiving such license of sale, others would grow to a sufficient size to be ⁶¹⁷ useful and valuable, and then the owner of the land would be completely deprived of all use of it. Principles leading to such consequences as we have mentioned cannot receive the sanction of the court."

Indeed, we have ourselves already foreshadowed the principle we have announced in *Gex v. Dill*, 86 Miss. 10, 38 South. 193, wherein it was held that: "Where a turpentine lease omitted to give date when the rights it granted should begin and end, but work was commenced thereunder within two years, a contention that the lease was void, as tending to create a perpetuity, was untenable." And it was so held to be untenable in the following language of the court: "We cannot support the position that the lease is void, as tending to create perpetuity, in that it does not give the date when the right it grants shall begin and end. We have examined all the authorities cited in the briefs of counsel. Under them we think that the most that can be claimed, if it can be, is that the work must commence in a reasonable time, and in this case we think it did commence in a reasonable time. This record does not show a lapse of thirteen years, as in cases cited, before the beginning, but not quite two years. This conclusion does not make it necessary to decide

whether or not in this case the delay, to be unreasonable, must pass the period of the statute of limitation." It is true that the precise point was not squarely decided, but the reasoning of the court, as it seems to us, clearly foreshadowed the principle which we now announce.

It results from these views that this was a case for an answer, and not a demurrer; and it follows that the decree of the court below, sustaining the demurrer and dismissing complainants' bill, is reversed, the demurrer overruled, and the cause remanded, to be proceeded with in accordance with this opinion—answer to be filed within thirty days from the filing of the mandate in the court below.

Mr. Justice Calhoun Dissented from the majority opinion, upon the ground that, under the deed in question, the grantee had a fee in the timber, only determinable after one year from his commencement to cut it, and an unlimited time in which to begin to cut. He said in part: "This deed belongs to that class admitting of no interpretation, because its language is so plain that it interprets itself. The beginning of the warranty conveyance, of 'all the timber now or hereafter growing, standing, lying or being on the land,' if it stood alone, I now think gave, under our system, a fee simple title to the timber for all time without the power of the courts to require entry or removal within any time. . . . To the foregoing is added, 'for the consideration aforesaid' the right of way, and to construct railways, etc., over 'said lands continuously,' for the purpose of removing timber 'from said lands and all lands adjacent' thereto. This certainly fixes no time to commence, nor authorizes any other power to fix it. Then it provides that it shall remain in force 'until the said Eastman, Gardiner & Co., their successors and assigns, commence to cut and for one year thereafter.' It concludes that the grantee and its successors and assigns shall 'pay the taxes on the land from the date hereof until the timber is removed'; this provision being doubtless thought sufficient to insure reasonable expedition. Certain it seems that the grantee had a fee to the timber, only determinable after one year from the commencement to cut. This is what was agreed to and paid for. Surely, if we could undertake to fix a reasonable time, we should make it long enough to include 'timber hereafter growing.' . . .

"It is not possible for me to reconcile the conclusion of my associates to the grant of 'timber hereafter growing' and the provision that the grantee should 'pay taxes on the land from the date hereof until the timber is removed.' There is no case referred to by counsel where the instrument had these clauses, which is decided in accordance with the views of my associates. There can be none where timber adjudications are like ours."

For Authorities Bearing on the principal case, see Hoit v. Stratton-Mills, 54 N. H. 109, 20 Am. Rep. 119; Saltonstall v. Little, 90 Pa. 422, 35 Am. Rep. 683; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Irons v. Webb, 12 Vroom, 203, 32 Am. Rep. 193.

GRAND LODGE COLORED KNIGHTS OF PYTHIAS v. SMITH.

[89 Miss. 718, 42 South. 89.]

INSURANCE, LIFE—Forced Marriage—Widow of Insured.—
If the insured was forced and coerced into marrying a woman, and never thereafter cohabited with, or even visited her, she is not his widow at his death within the terms of an insurance contract making the insurance payable to the “widow or other heirs” of the insured. (p. 719.)

L. J. Winston, for the appellant.

Bryson & Dabney, for the appellees.

723 CALHOON, J. The appellant lodge in 1903 insured the life of Chester Smith for four hundred dollars, payable to “his widow or other heirs.” He died, and his heirs claim the money in a bill against the lodge and one Mrs. Richardson. It is shown that there was a pretended marriage between Chester and Mrs. Richardson in 1904, but that was in fact no marriage at all, because he was forced into it, and that every movement at it and preceding it was under the coercion of pistols and bludgeons, and that immediately at the conclusion of the pretended ceremony he went away from her, has never cohabited with her, nor even visited her. The decree below, in effect, was that the marriage was void, in so far as it concerned this money claim and that the lodge pay the petitioning heirs. Mrs. Richardson was duly made a party defendant to the proceeding, but does not appeal; the lodge being the only appellant.

We agree with the chancellor that it must pay the heirs to the exclusion of Mrs. Richardson. The marriage was void, so far as this money claim in controversy goes, and payment to appellees is fully protected as against Mrs. Richardson. This conclusion does not touch the question of the course of the courts if there had been consummation of the coerced mar-

riage, nor do any of the decisions apply that refer to collateral attacks on a marriage.

Affirmed.

The Validity of Marriages procured by duress is discussed in the note to *State v. Lowell*, 79 Am. St. Rep. 370.

ADAMS v. SAUNDERS.

[89 Miss. 784, 42 South. 602.]

TAX COLLECTORS—Duty to Pay Over Taxes Collected.—A tax collector must pay over to the proper authorities all funds collected as taxes which come into his hands officially, and it is immaterial whether the tax collected by him is a constitutional tax, or whether it is illegal or void, or improperly collected. (p. 720.)

TAX COLLECTORS—Liability on Bonds.—A tax collector and his official bondsmen are liable for money collected by him as taxes, although he had no authority to collect it. (pp. 720, 721.)

O. G. Johnston, for the appellant.

Carroll & Magruder, Alexander & Alexander and G. B. Power, for the appellees.

799 MAYES, J. In 27 American and English Encyclopedia of Law, second edition, 800, citing numerous authorities, it is stated that a collector of taxes must pay over to the proper authorities all funds which come into his hands officially. So far as his duty to account is concerned, it is wholly immaterial as to whether the tax collected by him was a constitutional tax, or whether it was illegal or void, or improperly collected. He can in no event question the right of the state, or other political division, under whose authority he derives his own power to act, to receive the same. We literally adopt the rule announced by the authority above quoted, supported, as it is, by such sound principles of right, as the law applicable to this case. In the case of *State v. Harney*, 57 Miss. 863, in speaking of a tax collector, George, C. J., says: "He is treated as the agent of the state or county in collecting ⁸⁰⁰ the money, and as having received it for the benefit of his principal; and he will not be allowed to rely upon technical objections which might be made to the right of the state or county to it. The taxpayers who paid

the money voluntarily are considered as having paid it to him for the use of the treasury; and he will not be permitted, having thus received it, to question the right of the state or county to it." It is true that the language of the court, quoted above, was addressed to the objection made that taxes were levied by the board of supervisors sitting in Jackson, instead of at the courthouse at Raymond, and that therefore the tax collector, not having the power to collect the taxes, by reason of this irregularity, could not be held accountable for the tax in a suit by the state to recover same; but the court held that no such defense would be tolerated when the collector was sued for the amount actually collected. The defense sought to be set up in this case is no less technical than that sought to be made in the Harney case (57 Miss. 863). Defendant Saunders confesses that for the year 1890 he collected in his office the sum of one thousand and ten dollars and eighty cents more than he was charged with by the county and state, and that in the year 1891 he collected the sum of thirteen hundred and sixty dollars and thirty-one cents more than he was charged with. He admits that these sums were received by him in virtue of his authority as tax collector, and paid to him by the parties paying the amounts as either damage or tax, and yet insists that he has a right to withhold from the county these sums, because he had no authority under the law for the collection of same. When he admits the collection of the above amounts as tax, and it is shown that he was acting by virtue of his authority as tax collector, he is estopped by every principle of right to deny that the county is entitled to same. It would be contrary to public policy, contrary to both law and right, to hold that a tax collector, receiving money in virtue of his authority as such, could ever, under any circumstances, deny the right of the state or county to receive same, when the tax has been voluntarily paid ⁸⁰¹ by taxpayers and the amount is still in his possession. If any authority has ever upheld this proposition, we have been unable to find it. Defendant Saunders had not discharged his obligation to his principal when he had paid all taxes charged to him; but he must go further, and pay over all money collected by him as taxes and voluntarily paid, it matters not from what source or under what circumstances he received it. It may be true that the parties paying the tax have a right to the return of same, but the record fails to show that any person is endeavor-

oring to collect it from Saunders, or made protest at the time, and he cannot be allowed to hold this money, properly belonging to the county, merely because he fears he may hereafter be liable for it. That condition will be met when the occasion arises for its determination. The record shows that the state has been fully paid all its charges for the years in question, and, that being the case, the suit is properly maintainable for the county, and the county may be trusted to make the proper distribution of the fund; and, if it does not, persons representing it will be held accountable, but it can in no way prejudice appellee.

Let the decree be reversed and remanded, with instructions to the court below to enter judgment against appellee and his bondsmen for the sum of two thousand three hundred and seventy dollars and thirty-one cents, with such damages as are allowed by law, to be ascertained by an accounting.

CALHOON, J., Concurring. I fully concur with Judge Mayes. The officer was acting not only *colore officii*, but the payment was made to him because demanded *virtute officii*. His official trust attached, when he received the money, to account for it, and it should have gone where the voluntary payer designed it to go. Neither the officer nor his bondsmen can justify his withholding it, nor can they find any protection in the position that his collection was unauthorized or that he might (though he did not) have refunded to the taxpayer before he made his report, which omitted it.

Authorities upon the Question involved in the principal case will be found in the note to *Treller v. Gates*, 91 Am. St. Rep. 552-554, on the acts of the public officers for which their sureties are liable. It has recently been decided that a surety on official bond is liable for a statutory penalty incurred by his principal in taking illegal fees: *Eccles v. United States Fidelity etc. Co.*, 72 Neb. 734, 117 Am. St. Rep. 830.

BELL v. STATE.

[89 Miss. 810, 42 South. 542.]

HOMICIDE—Instructions.—On a trial for homicide a refusal to instruct the jury that it may consider the fact that, after the killing of the deceased, the defendant went to his home and on the next day voluntarily notified the sheriff that he would come in and give himself up, which he did, is not cured by a general instruction that flight, even when proved, may only be considered as a circumstance of guilt, and that the defendant must be acquitted unless shown by the evidence to be guilty beyond every reasonable doubt. (pp. 723, 724.)

HOMICIDE—Instructions.—On a trial for homicide, a refusal to instruct the jury on the subject of reasonable doubt and dealing with the individual juror, to the effect that, before the jury can convict, the evidence must be so strong that it convinces each juror of defendant's guilt beyond every reasonable doubt, and that if a single juror has a reasonable doubt of defendant's guilt, the jury cannot convict, is not cured by a general instruction dealing with the jury as a whole and telling it in effect that the entire jury must entertain a reasonable doubt of guilt in order to acquit. (p. 724.)

CRIMINAL LAW—Reasonable Doubt—Instructions.—In a criminal case, each juror, as distinguished from the jury as a whole, must be convinced beyond a reasonable doubt of the guilt of the defendant, before the jury can convict, and a refusal to give an instruction to this effect is error. (p. 726.)

Indictment and trial of one Bell for the killing of one White, which occurred at night in the room of a hotel and was the result of a quarrel arising between the parties while gambling. Immediately after the killing the accused fled to his home, but notified the sheriff of the county the next day that he would come in and surrender himself in a very short time, and he surrendered himself the next day. The accused set up the plea of self-defense. He was convicted of manslaughter and appealed.

A. F. Fox, for the appellant.

R. V. Fletcher, assistant attorney general, for the appellee.

813 WHITFIELD, C. J. This was a very close case upon the evidence, making it, consequently, of vital importance that there should be no material error of law committed by the court below against the appellant. The court refused to give for the appellant instruction B, which is as follows: "The court instructs the jury that in connection with the circumstances that, after the killing of David White, the defendant went to his home, they may also consider the fact, if such is proved, that on the day after the night on which he returned home he voluntarily notified the sheriff of Attala county that he would come in on Friday, the next day, and give himself up, and that on Friday, the next day, he did voluntarily come to the town of Kosciusko, and voluntarily surrendered himself to the sheriff." It is insisted by the assistant attorney general that this was cured by the seventeenth instruction given for appellant which was as follows: "The court instructs the jury, for the defendant, that flight,

even when proved, may only be considered as a circumstance of guilt; and unless the evidence in this case is so positive and certain as to produce in the minds of the jury the solemn conviction that the defendant, beyond all reasonable doubt, is guilty, then their verdict should be for the defendant." We do not think so. It was clearly error to refuse this instruction.

The court also refused instruction A, which is as follows: "The court further instructs the jury, for the defendant, that each and every one of you is entitled to have his own conception of what constitutes a reasonable doubt of the guilt of the defendant; that before you can convict this defendant the evidence must be so strong that it convinces each juror of the defendant's guilt beyond every reasonable doubt; and if, after a consideration of the evidence, or the want of evidence, a single juror has a reasonable doubt of the defendant's guilt, then you cannot convict him under this charge." The assistant ⁸¹⁴ attorney general insists that this is cured by the third instruction given for the appellant, which is as follows: "The court charges the jury that, if they have a reasonable doubt of the guilt or innocence of the accused, from all the evidence, they should acquit; and the defendant is entitled to the verdict of twelve men, each of whom, on the whole evidence, must be free from any reasonable doubt in his own mind, and he should be allowed to have his own conception of what a reasonable doubt is to him, and, unless the jury believe beyond a reasonable doubt, and to a moral certainty, that defendant is guilty, they should acquit." A careful reading of the two instructions will show that the refused instruction was specially directed to the proposition that each juror is entitled to exercise his own individual judgment. The third instruction for appellant is directed rather to the proposition that the entire jury must entertain a reasonable doubt in order to acquit. It deals with the jury as a whole.

The refusal of instruction A is also clear error. So long as the fundamental proposition remains that the verdict of a jury must be unanimous, and that, in criminal trials, a reasonable doubt of the defendant's guilt, arising out of the evidence, prevents a conviction, it must follow, as the inexorably logical result, that such reasonable doubt entertained by any one juror, after full conference with his fellow-jurymen, and a fair and honest weighing of the law as given, and

the evidence in the case, must equally prevent a conviction. It will not do to say that the charge means that, if one so doubts, the jury must acquit. That wrests plain language, and contravenes the simple, natural and manifest import of the charge, which is, merely, if one juror so doubts, it is his duty, acting at last on his oath, on his best judgment, after such conference and consideration, to stand on that judgment and prevent an illegal conviction. The danger is, not that one juror will influence eleven, and procure thus an improper acquittal; but that the ⁸¹⁵ one left against eleven, though most honestly entertaining such doubt, after such conference, will yield his convictions improperly; and practically the charge means simply a mistrial. That this is the meaning of such a charge is clearly and strikingly shown by the case of *State v. Rorabacher*, 19 Iowa, 154. There the charge as originally written was: "If any one of the jury entertain a reasonable doubt of the sufficiency of the proof to establish any one material averment in the indictment, you must give the defendant the benefit of such doubt, and acquit the defendant." The trial court struck out the words "and acquit the defendant," approving the rest, and said: "As asked, it was clearly objectionable. Such a proposition would entitle a party to an acquittal if any one juror entertained a reasonable doubt. It is a reasonable doubt entertained by the jury, and not by any one member thereof, that justified what—a mistrial? No, an acquittal": See, as especially enforcing this view, 2 Thompson on Trial Evidence, pp. 180-182, note 2. To this we agree, and its counterpart is equally obvious: That it is only the absence of a reasonable doubt on the part of the whole jury that will justify a conviction. In the case of *Hamilton v. Smith*, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276, the court expressly says: "Of course, each juror is to act upon his own judgment. He is not required to surrender his convictions unless convinced. He may be aided by his fellow-jurors in arriving at the truth, but he is not bound to find a verdict against his judgment, merely because the others entertain views different from his own."

We have thus fully noticed these two cases, because they are the only two (from the same state, too) which Mr. Thompson (*Thompson on Trials*, volume 2, section 2495) cites as intimating a variance from the general doctrine. Mr. Thompson himself, one of the most accurate and accomplished of

law-writers, approved the general doctrine thus stated by the supreme court of Indiana (Clem v. State, 42 Ind. 420, 13 Am. Rep. 369): "Each juror should ⁸¹⁶ feel the responsibility resting upon him as a member of the body, and should realize that his own mind must be convinced of the defendant's guilt beyond a reasonable doubt, before he can consent to a verdict of guilty. We think, notwithstanding the general charge of the court, that defendant had the right to have the charge asked given, thus specifically calling the attention of each juror to the duty and responsibility resting upon him, as well as to the legal rights of the defendant." This announcement is followed in Castle v. State, 75 Ind. 146; Stitz v. State, 104 Ind. 359, 4 N. E. 145, State v. Witt, 34 Kan. 488, 8 Pac. 769, and in the case of Carter v. State, 103 Ala. 93, 15 South. 893. In the latter case the court says: "The defendants requested in writing the following charges separately: 'Unless each of you is convinced beyond a reasonable doubt of the guilt of the defendants, from the evidence in the case, then you should not convict them.' 'Before you can convict the defendants you should each be convinced beyond a reasonable doubt of their guilt from the evidence and the evidence alone.' These charges were severally refused, and the defendants excepted to each refusal. That the court erred seems too plain for argument. There is nothing better settled in our jurisprudence than that the concurrence of all the jurors is essential to a verdict in all cases, civil and criminal. This is as well settled as the other principle that the jurors in a criminal case must be satisfied beyond a reasonable doubt of the defendant's guilt before there can be a conviction. It is logically impossible to apply these principles and hold that a conviction of a criminal charge may be had, although one of the jurors may not believe beyond a reasonable doubt that guilt has been established. Each juror must be satisfied beyond a reasonable doubt that the accused is guilty before there can be a conviction. This right is so securely guarded that, when a verdict of conviction is read, the defendant may have the jury examined by the poll to make sure that it is the verdict ⁸¹⁷ of each juror." These views are given the sanction of Mr. Thompson: 2 Thompson on Trials, sec. 2494 et seq.

It will not avail against this reasoning and concurrence of judicial opinion to say that so to hold is to over-refine. It is no more over-refining than the many approved instructions

explanatory of reasonable doubt—nay, than the doctrine of reasonable doubt itself—is. We do not like to “entangle justice in matters of form,” but a principle like this, ruling in all criminal trials, from misdemeanor to treason, seems to us, not form, but vital substance, the crystallized growth of centuries of experience.

For these errors the judgment is reversed and the cause remanded.

The Flight of a Person Accused of Crime, while a circumstance indicative of guilt, may not in itself be sufficient to warrant the jury in finding him guilty: *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286; *State v. Poe*, 123 Iowa, 118, 101 Am. St. Rep. 307; *State v. Matheson*, 130 Iowa, 440, 114 Am. St. Rep. 427.

The Doctrine of Reasonable Doubt is the subject of a note to *Burt v. State*, 48 Am. St. Rep. 566. An instruction that “if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty,” is said to be a correct statement of the duty of a juror: *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

O'FLYNN v. STATE.

[89 Miss. 850, 43 South. 82.]

CONTEMPT—Jury Trial.—In a proceeding for contempt, the defendant is not entitled to a jury trial. (p. 728.)

CONTEMPT—Sworn Denial—Evidence to Show Contempt.—In a proceeding for constructive contempt, the sworn answer of the defendant denying the contempt does not preclude the court from taking testimony to prove that such answer is untrue, and to establish the contempt. (pp. 728, 729.)

S. Deavouis and R. E. Halsell, for the appellants.

R. V. Fletcher, assistant attorney general, for the appellee.

⁸⁶¹ MAYES, J. These two cases being proceedings against appellants for contempt, and involving the same question, we consider them ⁸⁶² together. The district attorney filed an information in the circuit court against James and Charles O'Flynn, charging them with constructive contempt. This

information was sworn to and citation issued thereon for appellants. They appeared, in obedience to the citation, and made answer under oath, denying the statements of the information and purging themselves of the contempt charged against them. After they had filed their answer denying the allegations of the information, and over the protest of the contemnors, the court proceeded to hear testimony offered for the purpose of proving the charges against the appellants, alleged in the information as constituting the contempt. Objection was made by appellants to the hearing of any testimony on this motion in proceeding for contempt, which was overruled by the court, whereupon the appellants excepted, and asked that the matter be tried by a jury. This was also overruled by the court.

The court proceeded to hear the testimony, and on the facts adjudged appellants guilty of contempt, and proceeded to fine them. From this action of the court an appeal is prosecuted.

We do not think it necessary to discuss the error assigned because of the court's action in denying appellants the right of trial by jury in this proceeding for contempt, further than to say that the overwhelming weight of authority is that in such cases they were not entitled to a jury trial: 4 Ency. of Pl. & Pr. 789; 9 Cyc. of Law & Pr. 47.

The main complaint in this record is that the court had no right to hear the testimony to prove the charges alleged in the information, after appellants had answered under oath denying the charges. It is contended that the answer under oath of the contemnors entitled them to a discharge, and that the matter could not be inquired into further. It seems to have been the ancient common-law rule, now wisely departed from by most modern authorities, that where a person was charged with constructive contempt of court, and made answer to the ⁸⁶³ contempt proceedings on oath, if by his oath he cleared himself of the contempt, he was discharged. Under these older cases, no testimony could be heard by the court to disprove the answer under oath, but it must be taken as true, and the contemnor discharged, the only recourse being that he might be subsequently prosecuted for perjury, if he swore falsely. We do not feel warranted in following these older cases upon this subject, and see no reason why a court should be precluded from questioning the truth of the answer made in a proceeding for contempt against a party,

by taking testimony to prove that the answer is untrue. To hold this would be to hamper the courts in the administration of the law. We adhere to the rule which is adopted by the supreme court of the United States in a very recent case on this subject, the case of the United States v. Shipp et al., reported in the advance sheets of the United States supreme court, volume 5, page 165, date of February 1, 1907. The supreme court of the United States, in passing upon this very question, that is to say, the question of constructive contempts, says, on page 167: "Another general question is to be answered at this time. The defendants severally have denied under oath in their answer that they had anything to do with murder. It is argued that the sworn answers are conclusive; but in this proceeding they are to be tried, if they so elect, simply by their oaths. It has been suggested that the court is a party, and therefore leaves the facts to be decided by the defendant. But this is a mere afterthought, to explain something not understood. The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. On this occasion we shall not go into the history of the motion. It may be that it was an intrusion or perversion of canon law, as is suggested by the propounding of interrogatories, and the very phrase, 'purgation by oath.' If so, it is a fragment ⁸⁶⁴ of a system of proof which does not prevail in theory or as a whole; and the reason why it has not disappeared may be found in the rarity with which contempts occur." And again the court says: "The question was left open in *Re Savin*, 131 U. S. 267, 9 Sup. Ct. Rep. 699, 33 L. ed. 150, with a visible leaning toward the conclusion to which we come, and that conclusion has been adopted by state courts in decisions entitled to respect: *Huntingdon v. McMahon*, 48 Conn. 174; *State v. Matthews*, 37 N. H. 450; *Bates' Case*, 55 N. H. 325; *In re Snyder*, 103 N. Y. 178, 8 N. E. 479; *Crow v. State*, 24 Tex. 12; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Wartman v. Wartman*, Taney, 362, Fed. Cas. No. 17,210; *Cartwright's Case*, 114 Mass. 230; *Eilenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33 L. ed. 801. We see no reason for emasculating the power and making it so nearly futile as it would be if it were construed to mean that all contemnors

willing to run the slight risk of a conviction for perjury can escape.”

The court having tried the parties and adjudged them guilty of contempt on the facts, we do not feel warranted in disturbing its judgment.

Affirmed.

In Proceedings for Contempt, the defendant is not entitled to a jury trial: *People v. Tool*, 35 Colo. 225, 117 Am. St. Rep. 198; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624. As to the conclusiveness of his answer, see *In re Robinson*, 117 N. C. 533, 53 Am. St. Rep. 596; *Percival v. State*, 45 Neb. 741, 50 Am. St. Rep. 568.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

IN RE SWITZER.

[201 Mo. 66, 98 S. W. 461.]

APPEAL AND ERROR.—A Person not a Party to the Record may be Entitled to Appeal where the statute gives the right of appeal to certain enumerated persons “or other person having an interest in the estate under administration.” (p. 735.)

APPEAL AND ERROR—Right of a Guardian to Appeal from an Order Settling His Accounts.—Where a statute declares that the right of appeal in cases involving the administration of estates shall extend to any heir, devisee, or creditor or other person having an interest in the estate under administration, the sureties of a guardian may appeal from an order settling his accounts and fixing his liability to his ward. (pp. 735-738.)

JUDGMENTS, Sureties upon Official Bonds, When Parties to.—The sureties on the official bond of a guardian are to be deemed parties to the record of a judgment against their principal, and may hence appeal therefrom. (p. 735.)

APPEAL AND ERROR—Construction of Statutes Giving a Right of Appeal.—Where it is apparent that persons seeking a right of appeal have a substantial interest in the subject matter of a controversy, the court should not hesitate to hold that they have a right of appeal, if, by a fair and reasonable interpretation of the statute, they can be brought within its provisions. (p. 738.)

GUARDIAN, Sureties of, When not Bound by a Receipt of Their Principal as Administrator.—If a person has acted as administrator of an estate and is appointed guardian of one of the heirs, and in the latter capacity gives a receipt to himself as administrator without actually having received as guardian the moneys so receipted for, such receipt is not binding on his sureties as such guardian, nor does it discharge his sureties as administrator. (p. 739.)

GUARDIANS, Commissions of are Subject to the Discretion of the Court.—Though a guardian has administered the estate of his ward in a very careless manner, the appellate court will not interfere with the order of the lower court allowing commissions to such guardian. (p. 739.)

APPEAL AND ERROR—Matters not Called to the Attention of the Lower Court.—The respondents are not entitled to the reversal of a cause or the restatement of an account in an appellate court

where they have not appealed, and the attention of the trial court was in no manner directed to what is claimed in the appellate court to constitute error in the settlement of an account. (pp. 739, 740.)

GUARDIAN, Sureties of are not Responsible for Defalcations of Their Principal While Administrator.—If an administrator during the pendency of his administration is guilty of the conversion of property and is afterward appointed guardian of the heirs, his sureties in the latter capacity cannot be made answerable for his defaults as administrator. (p. 740.)

Marley, Swearingen & Utley, for the appellant.

Lathrop, Morrow, Fox & Moore and Gage, Ladd & Small, for the respondents.

79 FOX, J. This cause is brought here by appeal from a judgment of the circuit court of Jackson county, Missouri. In order to determine the legal propositions involved in this controversy, it is sufficient to make a very brief statement of the facts.

Sometime prior to May 24, 1880, Henry L. Switzer, of Jackson county, Missouri, died. His widow, Josephine Switzer, was appointed administratrix of his estate by the probate court of said county. She administered said estate and on August 24, 1882, was discharged by the order of said court. Henry L. Switzer left surviving him the widow and five minor children. On the ⁸⁰ twenty-fourth day of May, 1880, while the administration of Henry Switzer's estate by the widow was pending, the probate court of Jackson county, Missouri, at Kansas City, appointed the widow, Josephine Switzer, the guardian of the person and estate of her minor children, of whom appellant in this case, Henry W. Switzer, was one. The widow, Josephine Switzer, gave bond as guardian in the sum of \$9,000, with J. A. Bachman and Frank Askew as securities. On May 20, 1882, there was a final order of distribution of the estate of Henry Switzer, deceased, and notwithstanding Josephine Switzer, the widow, had, in 1880, been duly appointed by the probate court of Jackson county, Missouri, guardian of her minor children, she, on the twentieth day of May, 1882, made another application for appointment as guardian of her minor children and the probate court granted such application, and made an order of appointment, fixing her bond at \$40,000. She gave the bond with Henry J. Hucke and Henry Tobener as securities. On the twenty-fourth day of August, 1882, Josephine Switzer, as guardian of Henry W. Switzer, this appellant, gave a receipt to herself

as administratrix of Henry Switzer, deceased, for \$5,252.01. Similar receipts for the other minor children were filed by the administratrix and she was discharged as such administratrix. It is conceded by the record in this cause that there was no money actually passed from herself as administratrix of the estate of Henry Switzer, deceased, to herself as guardian of Henry W. Switzer, this appellant. Josephine Switzer, as guardian, made numerous annual settlements. It can serve no good purpose to give in detail those settlements. It is sufficient to refer to the final settlement which was allowed and approved by the court, over which the main contentions in this proceeding arise.

In some of the guardian's settlements she had been allowed \$1,000 a year for support of a ⁸¹ ward, but in her final settlement these allowances were abandoned and she was charged with the \$833.33 life insurance money and interests, the \$5,252.01, which she had in her hands as administratrix, and as such had taken her receipt, as guardian for, with interest, and the \$6,270.83, which she received from a sale of real estate belonging to herself and her children, and she asked for credit for \$6,540 for the board, maintenance and education of her ward, at \$30 per month, for eighteen years and two months, for a credit for \$2,977.78 for her conveyance to him of one-sixth of the business property, for costs of the probate court \$30, and \$1,156.97 commissions at five per cent, and \$37 cash paid to the ward, making a balance due the ward of \$12,327.78.

It was admitted on the hearing that the ward had received an additional \$247, which was allowed as a credit, and the balance was approved by the court, showing Mrs. Switzer indebted to the ward for \$12,150.78. This settlement was approved by the probate court. From this settlement, Frank Askew and J. A. Bachman, securities for the guardian on her first bond of \$9,000, appealed to the circuit court. On the trial in the circuit court the item of \$5,252.01 was stricken out, with all interest on it, on the ground that she was not chargeable, as guardian, with it, as it had never, in fact, come into her hands as guardian. The court also allowed her \$35 per month for the maintenance and schooling of the ward, and also allowed her the sum of \$613.15 for commissions. The balance found in her hands by this settlement is \$3,963.34, and from this Henry Switzer, the ward, has appealed to this court.

This is a sufficient statement to enable us to determine the legal propositions involved in this proceeding. The record is now before us for consideration.

⁸² The record in this cause discloses the following assignments of error: That the court erred: 1. In entertaining the appeal, or, in other words, the securities in such cases have no right to appeal; 2. In striking out the item of charge, \$5,252.01, the amount receipted for by the guardian to herself as administratrix, but not paid over; 3. In increasing the monthly allowance for board, lodging, clothing and other expenses of support and maintenance, from \$30 per month, as claimed by the guardian, to \$35; 4. In allowing credit for \$613.15 for commission.

1. It is manifest from the brief of learned counsel for appellant that the vital and most important question involved in this proceeding is the right of the sureties on the guardian's bond to appeal from the final settlement of the guardian, made and approved by the probate court of Jackson county.

This proposition necessitates the consideration of the statutes conferring the right of appeal. The sections of the statute pertinent to this question are, first, section 278, which provides that the right of appeal in cases involving the administration of estates shall extend to any heir, devisee, legatee, creditor or other person having an interest in the estate under administration. Section 3535 of the Revised Statutes of 1899 provides for the right of appeal from any final order or judgment of the probate court in guardianship matters in like manner and in the same effect as in appeal in cases of administration.

The question to be answered in this proceeding is, Have the sureties upon the guardian's bond such an interest ⁸³ in the administration of the estate of a minor as to bring them within the provisions of the statute conferring the right of appeal in such cases?

It is earnestly insisted by learned counsel for appellant that the sureties upon Mrs. Switzer's bond as guardian for the appellant were not parties to the proceeding in the probate court, had nothing to do with the final settlement, and therefore have no right of appeal. We are unable to give our assent to this contention. The very terms of the statute indicate that the legislature did not intend to limit the right of appeal to simply those who were parties to the proceeding. The statute applicable to administration of estates gives the

right of appeal to any heir, devisee, legatee, creditor or other person having an interest in the estate. This provision certainly does not contemplate, as a condition precedent to the right of appeal, that the persons enumerated must necessarily be parties to the proceeding. We are unable to conceive of any persons who are more interested in the administration of a minor's estate (other than the minor himself), than the sureties on the guardian's bond. Their contract upon the bond makes them responsible for all the acts of the guardian respecting the administration of his ward's estate; therefore, they are deeply interested in the fair and proper administration of the estate and the distribution of the assets. Upon a careful consideration of the provisions of the statute applicable to appeals in cases of this character, we are decidedly inclined to the opinion that the sureties on the guardian's bond are persons that have such an interest in the administration of the estate as confer upon them the right of appeal from a judgment approving the final settlement of the guardian, for whose acts and conduct they are sureties.

In 2 Cyclopaedia of Law and Procedure, 638, in the text, we find this general rule announced: "The sureties on an official bond become parties to the record by a judgment ⁸⁴ against the principal on the bond, and may appeal from such judgment." Numerous authorities are cited in support of the rule announced in the text from various states, including our own state. The reason assigned for this rule, and we confess that it is a good one, is that "in the absence of fraud or collusion, a judgment against a principal is conclusive as against his surety." Therefore, we can readily see the interest the surety has in a judgment, which, so far as the record is concerned, only purports to affect the principal.

While this proposition of the right of appeal on the part of the surety from a judgment against his principal has never been sharply presented to any of the appellate courts of this state, yet we find that jurisdiction has been entertained in such cases. In *re Tucker*, 74 Mo. App. 331, was very similar to the case at bar, and while the question as to the right of appeal is not discussed, yet it is manifest that the court entertained jurisdiction and determined the case upon its merits.

This court, in *Nolan v. Johns*, 108 Mo. 431, 18 S. W. 1107, very clearly announces the rule applicable to the right of appeal. While in that case the court had in judgment the statute applicable to appeals from the circuit court in civil

cases, yet the principles announced are clearly applicable to the proposition now confronting us in this proceeding. The distinction between the statute in judgment before the court in that case and the statute applicable to the case at bar is very slight. Section 3710 of the Revised Statutes of 1879 gave the right of appeal to every person aggrieved by any final judgment or decision of any circuit court in any civil cause. The statute as applicable to this case gives the right of appeal to any heir, devisee, legatee, creditor or other person interested in the estate under administration. In the case last cited the question of the rights of sureties upon an injunction bond was involved. ⁸⁵ There was a judgment in the circuit court against the principal in the bond alone, and the sureties sought to be heard, but were refused, and they prosecuted an appeal. It was insisted in that case, as it is in the case at bar, that there was no right of appeal on the part of the sureties. Judge Macfarlane, in speaking for this court, thus clearly treated the question. He said: "It is clear that it was not intended that the right of appeal should be limited to persons who were technically parties to the suit, and against whom the judgment was directly rendered. 'Every person aggrieved' includes every person whose rights were in any respect concluded by the judgment. The use of the designation 'person' instead of 'party' in a chapter of the statute treating exclusively of practice and proceedings in civil cases is itself suggestive that others than those technically parties to a suit and judgment should have the right of appeal. Furthermore, it is right and just that any person whose interests are injuriously affected and concluded by a judgment should have the right to a review, by the appellate court, of the proceedings which resulted in such judgment." During the course of the opinion the learned judge, in further treating of the question presented, said: "But it is insisted that, as no judgment was in fact rendered against the sureties, their rights are not affected by the judgment against the principal alone. We do not think the conclusion follows. The conditions of the bond were that plaintiff 'shall pay all sums of money, damages and costs, that shall be adjudged against him [the principal] if the injunction shall be dissolved.' The rule is that, 'wherever a surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment,' if free from fraud and collusion: Freeman on Judgments, 4th ed.,

sec. 180; Towle v. Towle, 46 N. H. 431; Methodist Churches v. Barker, ⁸⁶ 18 N. Y. 463; McAllister v. Clark, 86 Ill. 236; Hotchkiss v. Platt, 7 Hun, 56, affirmed 66 N. Y. 620. These sureties, by the very terms of their contract, undertook to pay all damages that should be adjudged against their principal. The amount of damages assessed, if unaffected by fraud or collusion, will bind the sureties under the terms of their undertaking, notwithstanding a judgment might also have been entered at the time of assessment against them. We conclude that the appeal was properly taken by the sureties."

In support of the conclusions reached in Nolan v. Johns, 108 Mo. 431, 18 S. W. 1107, the case of Farrar v. Parker, 3 Allen (Mass.), 556, was cited with approval. The Massachusetts case is strikingly similar to the case at bar. The supreme court of that state, in discussing the proposition of the right of appeal on the part of sureties, said: "If there be any sufficient reason for sustaining the appeal in the two cases first cited, a much stronger ground exists here for the sureties in the bond of the guardian to appeal and contest this decree. The principal is dead; his estate is insolvent; the sureties are the persons to be called upon to make good the delinquency thus found to exist on the part of the guardian. This decree, if once properly established, fixes the amount of liability of the sureties on their bond. In ordinary cases of a solvent principal, whose property was ample to respond for all sums with which he might be charged, the sureties would have no immediate interest, nor can it be supposed that they would attempt to interpose against the will of the principal, if they had the power to do so; but in a case like the present, where the principal is dead and his estate is insolvent, they are directly interested and affected by the decree; and they are persons aggrieved by it, if the amount of the indebtedness of the guardian is settled upon wrong principles."

In McCartney v. Garneau, 4 Mo. App. 567, one of ⁸⁷ the early cases by the court of appeals of this state, it was ruled that "a final settlement by a surviving partner, in the probate court, is not ex parte, but is made upon notice, and has the effect of a judgment. If not appealed from, it binds the sureties of the administrator of the partnership estate; they have the right of appeal from the settlement."

The leading case relied upon by appellant as announcing a rule in conflict with the conclusions as herein indicated is St. Louis Zinc Co. v. Hesselmeyer, 50 Mo. 180. A careful

analysis of that case will make it manifest that it in no way conflicts with the rules upon this proposition heretofore announced. It will be observed that the judgment sought to be appealed from by the sureties upon the bond was simply one dissolving the injunction. There was no judgment for any amount against the principal or the sureties, and they were in no sense parties to the original proceeding which simply involved the legal proposition as to whether the injunction was properly granted or not. But it would be entirely a different case, if after the dissolution of the injunction, the court had proceeded to assess the damages and render judgment against the principal alone, for in that case the sureties would be interested in the amount of damages assessed, whether they were correctly assessed and whether or not the proper elements of damage were duly considered, and from a judgment of that character the sureties unquestionably would have had the right of appeal.

While it is true that the right of appeal is purely statutory and persons who avail themselves of such right must be embraced within the provisions of the statute conferring such right, yet the tendency of judicial opinion is that cases should be tried upon their merits, and the right of appeal should not be unduly restricted; and where it is made apparent that persons seeking the right of appeal have a substantial interest ⁸⁸ in the subject matter of the controversy, if by a fair and reasonable interpretation of the statute they can be brought within its provisions, the court should not hesitate to allow them the right of appeal.

We are unwilling to say in this case that the sureties, who were liable for the amount shown by the final settlement of the guardian, who is the mother of this appellant, have no such an interest in the administration of that estate as would authorize them to appeal from the approval of a final settlement, and have a hearing in the appellate court as to the correctness or incorrectness of the statement of the account of such final settlement. Our conclusion upon the first proposition is that the sureties on Mrs. Switzer's guardian bond had the right to appeal.

2. It is insisted by appellant that the court erred in striking out the item of charge of \$5,252.01, the amount receipted for by the guardian to herself as administratrix, but not paid over.

Upon this proposition the record discloses beyond question that Josephine Switzer, as administratrix of the estate of Henry L. Switzer, deceased, did not in fact transfer the assets and take charge of the same herself as guardian of Henry W. Switzer. She simply gave herself, as guardian, a receipt to herself as administratrix, without any payment of money, and this is practically conceded by the record. We are of the opinion that she could not discharge herself and her sureties as administratrix and impose a liability on herself and her sureties as guardian in this sort of way; and this conclusion finds support in the recent cases of *State v. Elliott*, 157 Mo. 609, 80 Am. St. Rep. 643, 57 S. W. 1087; *State v. Branch*, 151 Mo. 622, 52 S. W. 390; *State v. Branch*, 134 Mo. 592, 56 Am. St. Rep. 533, 36 S. W. 226.

3. Appellant complains of the increase of monthly allowance of board, lodging, clothing and other expenses of support and maintenance from \$30 per month, as claimed by the guardian, to \$35 per month. The trial court had the evidence upon this subject before it, and we have no disposition to interfere with the allowance made.

4. It is insisted by appellant that the court erred in allowing credit for \$613.15 for commissions to the guardian. This was a matter purely within the discretion of the court. While it must be confessed that the record in this case discloses a very careless method of administering the estate of a minor, yet it is also disclosed that she made numerous annual settlements of this estate, and her improper methods of doing business, it seems, were never discountenanced by the probate court. It further appears from the settlement in the probate court that appellant insists on having stand in this court that greater commissions were allowed than those allowed by the circuit court, upon a restatement of the account with the guardian. We shall not interfere with the discretion of the trial court who had all the parties before it, and the court held in the community where this estate was administered, and we are disposed to defer to its statement of the account between these parties.

The respondents in their brief insist that this court should again restate the account and give the guardian credit for the items of \$2,977.78 and \$247, paid the ward and credited in the probate court. It is insisted that this was an oversight in the statement of the account by the circuit court. The respondents are not appealing in this case. The atten-

tion of the trial court was in no manner directed to what is now claimed was a ⁹⁰ mistake. It may be upon a restatement of his account that the appellant, as to these two items, would like to be heard. Therefore, that question could only be adjusted by reversing and remanding the cause. There is no appeal upon the part of the respondents in this case asking for the reversal of this judgment on the ground of those errors, if they were errors.

In view of the record before us we are unwilling to make any further change in the statement of the account as made by the trial court. While it may be seriously complained of that the appellant in this case has been deprived unjustly of a large part of his estate, yet the record discloses that the principal mismanagement of this estate occurred during the administration of the estate of his father. In fact, the record shows beyond question that the conversion of large amounts of property took place during the administration of the estate of Henry Switzer, deceased, and the present sureties upon the guardian's bond should not be made liable for the misconduct and mismanagement of the estate during the administration. They should only be required to account for that part of the estate that actually went into the hands of Josephine Switzer as guardian of Henry Switzer.

Finding no reversible error in the trial of this cause, there is nothing left to be done except to affirm the judgment, and it is so ordered.

All concur.

WHO IS ENTITLED TO APPEAL AS A PARTY INTERESTED OR INJURED.

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I. General Principles Controlling.

a. **Modern Statutory Regulations.**—The common-law rule limiting the right to appeal to those who were parties or privies to the action in which the judgment or decree complained of was rendered has been very generally reincorporated by the statutes regulating the subject of appeal, they generally purporting to give that right to any party aggrieved. In some of the states, however, especially in proceedings involving the settlement of the estates of deceased persons, statutes similar to that construed in the principal case have been enacted in which the word "person" has been substituted for "party." But these appeal statutes by no means confer this right upon everyone who may consider himself aggrieved by a judgment, but only to those who have been aggrieved in a legal sense and whose interest or injury is established under certain well-defined rules.

One of these rules, which apply alike to every person desiring to appeal, whether a party to the record or not, is, that he must have an interest in the subject matter of the litigation, otherwise he can have no standing on appeal: *In re Blythe*, 108 Cal. 124, 41 Pac. 33; *Brown v. City of Atlanta*, 66 Ga. 71; *Branswell v. Equitable Mortgage Co.*, 110 Ga. 30, 35 S. E. 322; *Coe v. Simmons Boot & Shoe Co.*, 61 Ill. App. 602; *Winne v. People*, 177 Ill. 268, 52 N. E. 377; *Tipton County v. Pershing*, 22 Ind. App. 147, 53 N. E. 297; *Board of Commissioners v. Wild*, 37 Ind. App. 32, 76 N. E. 256; *Polk v. Johnson*, 167 Ind. 548, 78 N. E. 652, 79 N. E. 491; *Mullins v. Bullock*, 14 Ky. Law Rep. 40, 19 S. W. 8; *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35; *Parker v. Gwynn*, 4 Md. 423; *Cecil v. Cecil*, 19 Md. 76, 81 Am. Dec. 626; *Glenn v. Reid*, 74 Md. 238, 24 Atl. 155; *Northampton v. Smith*, 52 Mass. (11 Met.) 390; *Burns v. Phinney*, 53 Minn. 431, 55 N. W. 540; *Dougherty v. Compton*, 3 Smedes & M. (Miss.) 100; *Othenin v. Brown*, 66 Mo. App. 318; *Plattsouth First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259; *Bush v. Rochester City Bank*, 48 N. Y. 659; *In re Mayor etc. of New York*, 52 App. Div. 478, 65 N. Y. Supp. 77; *Dowsnap v. Mathews*, 53 Misc. Rep. 48, 102 N. Y. Supp. 945; *Faison v. Hardy*, 118 N. C. 142, 23 S. E. 959; *Lawrence County v. Appeal*,

67 Pa. 87; *Ex parte Neal Loan etc. Co.*, 58 S. C. 269, 36 S. E. 584; *Strong v. Winslow*, 3 Pinn. (Wis.) 27; *McGregor v. Pearson*, 51 Wis. 122, 8 N. W. 101; *City of New Orleans v. Peake*, 52 Fed. 74, 2 C. C. A. 626.

In *Mullins v. Bullock*, 14 Ky. Law Rep. 40, 19 S. W. 8, an action of replevin was brought against a constable to recover certain personal property seized by him on execution. A judgment was rendered against him for a return of the property and for costs, and he appealed. It was urged by the respondents that the constable was a mere stakeholder, and that the plaintiff in execution, and not the officer, was the party to appeal, but the court held that the constable had such special interest in the property as authorized him to contest the claim of the appellees. In the later case from the same state—*Whaley v. Commonwealth*, 110 Ky. 162, 61 S. W. 35—there was a contest between a county and taxpayers as to which was entitled to certain money alleged to have been illegally collected by the sheriff. It was held that the sheriff had such an interest as entitled him to appeal from a judgment against him in favor of the taxpayers for the portion of the tax held to be illegal and from a judgment against him in favor of the county for the remainder of the tax collected. So, too, a debtor over whose property a receiver has been appointed has such interest in the litigation as to entitle him to appeal from an order fixing the receiver's compensation: *Polk v. Johnson*, 161 Ind. 548, 78 N. E. 652, 79 N. E. 491. But in *Board of County Commissioners v. Wild*, 37 Ind. App. 32, 76 N. E. 256, in an action against the board of county commissioners to recover the proceeds of certain bonds sold by the defendant county to the plaintiff, and which had afterward been declared illegal, certain taxpayers who were interested in the suit and upon whose verified petition a special attorney had been appointed to represent them, were denied the right to appeal, the court holding that their interest was no greater than that of all taxpayers in every action brought against a municipal corporation.

In *Dewanap v. Mathews*, 53 Misc. Rep. 48, 102 N. Y. Supp. 945, the rule is announced that a person having an equity of redemption of property in the hands of a receiver has sufficient interest to authorize him to appeal from an order denying him leave to be made a party defendant in the action. But in an action to restrain a trustee from selling lands under a trust deed to satisfy valid liens until plaintiff's interest in the land could be determined, parties whose only interest in the suit was the payment of moneys secured by the trust deed could not appeal from a judgment declaring a parol trust in favor of plaintiff in the equity of redemption: *Faison v. Hardy*, 118 N. C. 142, 23 S. E. 955.

When a mechanic's lien adjudged against several lots was invalid as to one of them, a defendant who had no interest in that particular lot could not complain of such invalidity on appeal: *Othenin v. Brown*, 66 Mo. App. 318.

It is evident, too, that the interest which a person must have in the subject matter, in order to entitle him to appeal, must be a legal interest, for as was said in *Strong v. Winslow*, 3 Pinn. (Wis.) 27: "Courts of justice never open the door to individuals and permit litigation, for no other reason than that some one wishes to know what he can do with others engaged in business, which in no wise concerns or affects his rights. The ministers of justice ought never to consume time for the mere purpose of satisfying the morbid appetite of idle curiosity." Therefore, where a judgment dealt only with funds of third persons, and the defendant against whom judgment was asked had disclaimed any interest in such funds, he was not entitled to appeal from the judgment: *Lazur v. Cady*, 44 Wash. 339, 87 Pac. 344.

b. **Nature of Interest.**—Not only must a party desiring to appeal have an interest in the particular question litigated, but his interest must be immediate and pecuniary, and not the remote consequence of the judgment: *Brown v. City of Atlanta*, 66 Ga. 71; *State v. Talty*, 139 Mo. 379, 40 S. W. 942; *Swackhamer v. Kline's Admr.*, 25 N. J. Eq. 503; *Raleigh v. Rogers*, 25 N. J. Eq. 506; *Morris v. Garrison*, 27 Pa. 226; *Schneider v. Reid*, 123 Wis. 488, 101 N. W. 682.

Hence, the servant of a corporation having possession of its property cannot appeal from an order appointing a receiver for the assets of such corporation, because of such possession, or because his salary may be reduced by the receiver when appointed: *McFarland v. Pierce*, 151 Ind. 546, 45 N. E. 706, 47 N. E. 1. And where a deed had been adjudged fraudulent as to creditors, the grantor in such deed had no such interest in the land as authorized him to appeal from a decree setting the deed aside: *Hunt v. Childress*, 73 Tenn. (5 Lea) 247. But if the interest is substantial, as where in an action against a sole defendant for damages for personal injuries, such defendant can appeal from an order bringing in a new defendant and directing service of a supplemental complaint: *Heffern v. Hunt*, 8 App. Div. 585, 40 N. Y. Supp. 914.

So, too, a defendant in default can appeal from a joint judgment against himself and a codefendant, if the judgment was on a separate assessment of damages: *Waugh v. Suter*, 3 Ill. App. 271. And a defendant can appeal from a judgment against him for costs: *Kingsley v. Delano*, 172 Mass. 37, 51 N. E. 186; *McCabe v. Farnsworth*, 27 Mich. 52; *Landa v. McGehee* (Tex.), 19 S. W. 516. But a defendant as to whom a demurrer has been sustained cannot appeal or join in an appeal from a judgment subsequently rendered against his codefendant: *Ramsey v. Flournay*, 58 Cal. 260; *Witt v. Baars*, 36 Fla. 119, 18 South. 330; *Harms v. Jacobs*, 155 Ill. 221, 40 N. E. 488.

"Only a party who has a legal interest in the subject matter of a suit can sue out a writ of error to reverse a decree entered therein": *Strong v. Peters*, 212 Ill. 282, 72 N. E. 369. Hence,

the defendant in an action to foreclose a mortgage on real estate who had parted with his interest in the premises before the suit was brought is not entitled to appeal from the judgment of foreclosure, no personal judgment having been rendered against him: *Schneider v. Reid*, 123 Wis. 488, 101 N. W. 682.

A very interesting case as to the nature of the interest one desiring to appeal must have is that of *State v. Talty*, 139 Mo. 379, 40 S. W. 942. In this case a stockholder petitioned the court for an order directing the receiver of a corporation to permit an examination of the corporation's books of account. The corporation filed an answer alleging that the petitioning stockholder was acting in the interest of a rival company for the purpose of hindering a contemplated reorganization, and to force a sacrifice of defendant's property. Said the court: "Nor does the right of an appeal exist in favor of a party aggrieved or offended by the mere disclosure of facts brought about by the carrying out of an order or decree of court that ultimately may result disastrously to the party. It would be a most intolerable obstruction to the operations of our courts, and a paralyzation of their use, if parties having no legal interest in the result of their judgment, order or decree, and not pecuniarily affected thereby, out of a spirit of pure sentiment or suspicion of possible anticipated harm indirectly flowing to them therefrom, should be permitted an appeal."

c. Effect of Disclaimer and Dismissal.—If a party disclaims any interest in the subject matter of the suit, he deprives himself of the right to appeal from a judgment affecting the property concerning which the disclaimer is filed: *Palmer v. Merrill*, 70 Iowa, 227, 30 N. W. 494; *Page v. Havens*, 9 Kan. App. 888, 60 Pac. 1096; *Myers v. Mahoney*, 43 Neb. 208, 61 N. W. 580; *Brigham City v. Tolter Ranch Co.*, 101 Fed. 85, 41 C. C. A. 222. But the failure of a co-defendant to appeal from a judgment against him does not deprive the other defendants who are prejudiced by the judgment from appealing from it: *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Murray v. Guse*, 10 Wash. 25, 38 Pac. 753. And in *State v. King*, 6 S. Dak. 297, 60 N. W. 75, it is held that where several defendants, whose defenses are based on independent grounds, answer separately, the separate appeal by one from a judgment against all does not deprive the others from subsequently appealing from the judgment against them.

The defendant in a replevin suit who denies possession or ownership can appeal from a judgment awarding the plaintiff possession of the property if the judgment fails to award costs to the defendant: *Martin v. Porter*, 84 Cal. 476, 24 Pac. 109. Where a bill in equity was dismissed as to certain defendants, their assignments of error on a cross-appeal from a subsequent decree will not be considered: *Merritt v. Alabama Pyrites Co.*, 145 Ala. 252, 39 South. 555. But in *Ballard v. Kennedy*, 34 Fla. 483, 16 South. 327, a bill

was filed to foreclose a mortgage upon lands of a deceased mortgagor. The heirs at law were made parties defendant with the administrator, but the bill was afterward dismissed as to the heirs, and a decree of foreclosure rendered against the administrator. The heirs were allowed to appeal. This decision, however, is based on the Florida statute, which makes the realty of a decedent assets in the hands of an administrator, and as the heirs at law were not necessary parties to the foreclosure suit, they were not concluded by the decree.

d. Nominal Parties.—As one must have a substantial interest in the subject matter of the litigation before he is entitled to appeal from a judgment rendered therein, it follows that a merely nominal party to the action cannot prosecute an appeal. Thus, where the agent of a corporation, discovering a defect in plaintiff's title, procured title in himself as agent of the corporation from the real owner, such agent was not allowed to appeal from a judgment in favor of the plaintiff against him and the corporation for possession of the land, and against the corporation for damages: *Hawley v. Whitaker* (Tex. Civ. App.), 33 S. W. 688. But the nominal plaintiff in a garnishment proceeding has an appealable interest therein: *Murphy v. Consolidated T. Line Co.*, 32 Ill. App. 612. It has also been held that an unnecessary party to a proceeding and one who was not entitled to be made a party has no right to appeal from a judgment rendered in the action: *McMurray v. State Bank*, 74 Mo. App. 394; *McClure v. Manperture*, 29 W. Va. 633, 2 S. E. 761. But this doctrine is not universal, for in *Rickelson v. Torres*, 23 Cal. 636, it is said, on motion to dismiss an appeal: "It is further urged in support of the motion that the appellant has no interest in the decree, or in the subject matter of the controversy; that he was an unnecessary party; that prior to the commencement of the action he had assigned all the interest he ever had in the matter to others of the defendants. If such be the case, that he has no interest, and ought not to have been made a party, it is the fault of the respondents that he was a party, and affords no proper ground for this motion. If he ought not to have been made a party, the plaintiff ought not to have made him a party, and he should have dismissed the case as to him. But the plaintiff cannot hold a judgment against him, and at the same time deny him the right to appeal from that judgment. By admitting that the appellant had no interest in the subject matter, and that he ought not to have been made a party, the respondent virtually admits that he is not entitled to any judgment against him, which would of itself form a good ground of appeal."

e. When Appellant's Interest has Determined.—Though a party may have an appealable interest at the commencement of a suit, if his interest has determined before judgment, he cannot appeal from the judgment: *Hicks v. Cohen*, 72 Ga. 210; *Stauffer v. Salamonie*

Mining etc. Co., 147 Ind. 71, 46 N. E. 342; *Crigler v. Connor*, 12 Ky. Law Rep. 502, 14 S. W. 640; *Eichert's Estate*, 155 Pa. 59, 25 Atl. 824; *Coupland v. Tuller*, 21 Tex. 523. Thus, when a mortgagor had disposed of his equity of redemption, he could not appeal from a decree ordering a sale of the premises: *Raw v. Robertson*, 58 Md. 506. But if he was made a party to the suit and set up the defense of usury, he could appeal from a decree of foreclosure against him, because he would be estopped by the decree from setting up the same defense on the bond: *Andrews v. Stelle*, 22 N. J. Eq. 478. And where a complainant has parted with all of his interest in the suit pendente lite, he cannot appeal from the judgment, even though such interest is injuriously affected by it: *Gordon v. Gibbs*, 3 Smedes & M. (Miss.) 473; *Card v. Bird*, 10 Paige (N. Y.), 426.

So, too, if a party sells his interest in the subject matter of the suit after a final decree has been made, he cannot appeal from such decree: *Mills v. Hoag*, 7 Paige (N. Y.), 18, 31 Am. Dec. 271; *Kelly v. Israel*, 11 Paige (N. Y.), 147. And in *Printup v. Cherokee R. Co.*, 45 Ga. 365, a writ of error to review a judgment enjoining a certain person as agent was denied, the agency having terminated after the writ was sued out, but before the hearing. But in *Moore v. Jenks*, 173 Ill. 157, 50 N. E. 698, it was held that when a grantee was not allowed to be made a party, that his grantor who had conveyed all his interest could appeal from the judgment against his grantee. Said the court: "It would be a gross injustice to hold that a purchaser pendente lite is not a necessary party to a proceeding, and yet to hold that he has no right to appeal or right of review by writ of error through the defendant under whom he claims."

It has been held that a bankrupt who has been discharged pending an action has no further interest therein, and hence is not entitled to appeal from a judgment or decree rendered against him in the action prior to his discharge: *Kelly v. Israel*, 11 Paige (N. Y.), 147. But when pending a suit to foreclose a deed of trust the defendant had been discharged in bankruptcy, his right to appeal from a final judgment against him was upheld when the court had failed to notice his plea: *Young v. Cardwell*, 6 Lea (Tenn.), 195. In some jurisdictions it is held that one who is adjudged a bankrupt or who executes a deed of assignment for the benefit of creditors is thereby deprived of the right to appeal: *Bailey v. McIntyre*, 43 Ala. 664; *Sioux Falls Nat. Bank v. Sioux Falls First Nat. Bank*, 6 Dak. 113, 50 N. W. 829, where it is held that a national bank, after a receiver had been appointed for it, could not appeal from an order refusing to dissolve an attachment against the bank. But other cases hold that the mere adjudication of bankruptcy or the execution of a deed of assignment for the benefit of creditors does not deprive the bankrupt of the right to appeal: *O'Neil v. Dougherty*, 46 Cal. 575; *Francis v. Burnett*, 84 Ky. 23; *Sanford v. Sanford*, 58 N. Y. 67, 17 Am. Rep. 206.

II. Appellant Must be Prejudiced.

a. **General Rule.**—In addition to having a substantial interest in the subject matter of the litigation, only those can appeal who have been aggrieved by the judgment or decree complained of. Just what constitutes being aggrieved in a legal sense, as well as the different classes of persons who come within the purview of the appeal statutes, though not technical parties to the suit, will best be understood from the illustrations hereafter given. Some authorities, however, have undertaken to define in general terms the legal meaning of the word “aggrieved.” In *Adams v. Woods*, 8 Cal. 306, the court, after quoting the rule laid down by Sergeant Williams in *Williams v. Gwyn*, 2 Saund. 46—“no person can bring a writ of error, unless he is a party or privy to the record, or is prejudiced by the judgment; the rule upon the subject being that a writ of error can only be brought by him who would have had the thing if the erroneous judgment had not been given”—said: “Would the party have had the thing if the erroneous judgment had not been given? If the answer is yea, then the person is the party aggrieved. But his right to the thing must be the immediate and not the remote consequence of the judgment.”

The same test is adopted by the supreme court of New Jersey in *Black v. Kirgan*, 15 N. J. L. 45, 28 Am. Dec. 394.

In *Hewitt's Appeal*, 58 Conn. 223, 20 Atl. 453, the following definition is given: “To be aggrieved is to have a legal right, the infringement of which by the decree complained of will cause pecuniary injury.” And the rule was here applied by denying an executor the right to appeal from an order granting the application of a nonresident cestui que trust to have possession of property belonging to him turned over by the executor to his own trustee. The definition given in the *Hewitt* case is quoted with approval by the supreme court of Indiana in *McFarland v. Pierce*, 151 Ind. 546, 45 N. E. 706, 47 N. E. 1.

In *Polk v. Johnson* (Ind. App.), 76 N. E. 634, it is said: “An appealable interest exists when a judgment so affects a party or privy as that he will derive a substantial benefit from its modification or reversal.” While in *Scott v. Great Western Coal & Coke Co.*, 223 Ill. 271, 79 N. E. 53, the following language is used: “In order to call in question a judgment or decree before an appellate tribunal by appeal or writ of error, the plaintiff in error must be either a party to the record or sustain some mutual or successive relationship to the subject matter of the litigation or the parties, out of which arises the right, duty or privilege to have the judgment reviewed, or he must have some direct or collateral interest injuriously affected by the judgment upon which he can rest a right to a review.”

The following illustrations will serve to show when a person may be said to be aggrieved by a judgment or decree. The executors and

the devisees and the legatees of a decedent are parties aggrieved by an order setting apart a homestead for his widow, and as such may appeal therefrom: *Estate of Levy*, 141 Cal. 646, 99 Am. St. Rep. 92, 75 Pac. 301. Beneficiaries under a trust created by a will are entitled as parties aggrieved to appeal from an order admitting the will to probate: *Estate of Fay*, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340. But in *Bragg v. Blewitt*, 99 Wis. 348, 74 N. W. 807, it was held that the beneficiaries under a will could not appeal from a decree confirming a devise to another person.

In *Collier v. Hyatt*, 110 Ga. 317, 35 S. E. 271, it is stated that one of several defendants in an action of tort cannot appeal from a judgment sustaining a demurrer to the plaintiff's petition filed by his codefendants, as he is not prejudiced thereby.

In *Pope v. North*, 33 Ill. 440, proceedings were instituted to foreclose a mortgage executed by a husband and wife. Both were named as parties defendant, but no summons was issued or served on either. The husband alone approved, and he admitted the allegations in the bill, and a decree was rendered ordering payment of the debt or in default a sale of the mortgaged premises. It was held that though the wife was a proper party, she was not aggrieved by the decree and could not appeal; she not being in court by service or otherwise, her rights in the premises were not foreclosed by the decree. And a similar ruling is made in *Porter v. Singleton*, 28 Ark. 483.

In *Labar v. Nichols*, 23 Mich. 310, it is held that an heir at law who had been left as his sole portion a small legacy which it was ~~morally~~ certain the funds would pay, was not so aggrieved by an allowance of the administrator's account as to appeal therefrom, although there was a remote possibility that contingencies might arise which would imperil his legacy. Upon the same theory a judgment creditor cannot appeal from a judgment obtained against his debtor: *Black v. Kirgan*, 15 N. J. L. 45, 28 Am. Dec. 394. Nor can a judgment debtor appeal from an order enjoining him from paying the money to anyone except a receiver: *Globe Phosphate Co. v. Pinson*, 52 S. C. 185, 29 S. E. 549.

Where parties whose right to share in the distribution of an estate depended on the property being community property, and did not attack the sufficiency of the evidence to sustain a finding that it was separate property, they were not parties aggrieved so as to entitle them to appeal on the ground that the court had no jurisdiction to make the decree: *In re Piper's Estate*, 147 Cal. 606, 82 Pac. 246.

b. *Prevailing Parties.*—As only those who have been aggrieved by a judgment are entitled to appeal therefrom, there are cases holding that a party has no right to appeal from a judgment in his own favor: *Todd v. De La Mott*, 9 Colo. 222, 11 Pac. 90; *Fischer v. Hanna*, 21 Colo. 9, 39 Pac. 420; *Northrop v. Jenison*, 12 Colo. App. 523, 56 Pac. 187; *Hayden v. Stone*, 112 Mass. 346. While the

language in these cases is broad, they evidently apply only when the judgment gives the complaining party the full relief demanded, for, undoubtedly, a party can appeal from a judgment in his own favor if he has been injured by it. This principle is abundantly upheld, and is based on the theory that one who has not obtained the full relief he has demanded, is entitled to have an erroneous judgment reversed in order that he may obtain another trial: *Hale v. Crowell's Admx.*, 2 Fla. 534, 50 Am. Dec. 301; *Jones v. Wright*, 4 Scam. (Ill.) 338, 39 Am. Dec. 417; *Thayer v. Finlay*, 36 Ill. 262; *Hartman v. Belleville & O. R. Co.*, 64 Ill. 24; *Gentry v. Bartnett*, 22 Ky. (6 T. B. Mon.) 113; *Miller v. Martin*, 8 N. J. L. 201; *Parker v. Newland*, 1 Hill (N. Y.), 87; *McIntyre v. German Savings Bank*, 59 Hun, 536, 13 N. Y. Supp. 674; *Lenoir v. South*, 32 N. C. 237; *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. ed. 933. In *Lenoir v. South*, 32 N. C. 237, the court said: "It seems proper to notice an objection taken in this court that a plaintiff could not appeal from a judgment in his own favor, as we have no doubt he may. The injury to him is of the same nature, whether the error be in not giving all or a part of what he is entitled to, and he has a right to the judgment of this court, whether he ought not to have a verdict and judgment for all he claimed instead of the small part he got."

So, also, in *McIntyre v. German Savings Bank*, 59 Hun, 536, 13 N. Y. Supp. 674, where a motion that plaintiff be directed to enter final judgment and that the collection of costs awarded plaintiff on an appeal from an order in the action be stayed, was denied as to the entry of judgment but granted as to the stay, the plaintiff was allowed to appeal from so much of the order as stayed the collection of the costs, though he allowed the other parts of the order to stand. But unless one who prevails in a suit is injured by the judgment in his favor, he is not entitled to appeal, for, as is said in *Re Jenks*, 129 Iowa, 139, 105 N. W. 396: "A party in whose favor a judgment was rendered cannot appeal from the findings of fact, however erroneous they may be, if he was not prejudiced thereby." And it is not necessary that a party shall be entirely defeated, in order to entitle him to appeal, but if he is aggrieved by only a part of a decree, he can by appeal call in question only the part thereof which injuriously affects him: *Cuyler v. Moreland*, 6 Paige (N. Y.), 273; *Idley v. Bowen*, 11 Wend. (N. Y.) 227. And if a decision is correct so far as a party's interests are concerned, he cannot appeal because it violates the rights of other persons: *McRobbie v. Higginbotham*, 11 Colo. 312, 18 Pac. 31; *Hudson v. Hudson*, 84 Ga. 611, 10 S. E. 1098; *Ransom v. Henderson*, 114 Ill. 528, 4 N. E. 141; *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *City of Ottawa v. Hayne*, 114 Ill. App. 21 (affirmed in 214 Ill. 45, 73 N. E. 385); *Iles v. Cox*, 83 Ind. 577; *Simms v. Lloyd*, 58 Md. 477; *Steele v. White*, 2 Paige (N. Y.), 478; *Bullard v. Kenyon*, 78 Hun (N. Y.), 26, 29 N. Y. Supp. 772; *Hyatt v. Dusenburg*, 106 N. Y. 663, 12 N. E. 711; *Byrnes v. Holscher*, 96 N. Y. Supp. 89.

c. **Deprivation of Right.**—A party having a right to appeal may by his own acts be deprived of such right. Thus, one cannot complain of an instruction given at his request: *Nordquist v. Hall*, 71 Kan. 858, 80 Pac. 952; *Werckman v. Taylor*, 112 Mo. App. 365, 87 S. W. 44; *Haxton v. Kansas City*, 190 Mo. 53, 88 S. W. 714. Nor can he complain of an error in an instruction when a like error appears in an instruction given at his request: *Fraternal Army of America v. Evans*, 114 Ill. App. 578, affirmed in 215 Ill. 629, 74 N. E. 689. And a defendant cannot appeal from a decree granted in accordance with the prayer of his cross-complaint: *Gumaer v. Draper*, 33 Colo. 122, 79 Pac. 1040. And if a plaintiff in whose favor a judgment is rendered seeks satisfaction thereof by causing execution to be issued to compel payment, he is estopped from prosecuting an appeal from such judgment. This is evidently based on the principle that one should not be permitted to accept and retain the fruits of a judgment in his favor and at the same time insist that it is erroneous. Where a judgment has been voluntarily paid by a defendant, there is some conflict of authority as to whether the plaintiff is thereby prevented from taking an appeal, but the better rule seems to be that laid down by *Freeman on Judgments*, section 466, namely, that voluntary payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement nor kept on foot to cover new and distinct engagements. This doctrine is approved in *Re Estate of Baby*, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405, where it is held that if persons to whom an estate has been distributed accept and receipt for their share as distributed, they cannot appeal from such decree.

As to whether a defendant who has satisfied a judgment against him is thereby deprived of the right to appeal from such judgment is also a question upon which the cases differ. But the decided weight of authority and that which seems based on the better reasoning is, that a defendant is not deprived of his right to appeal by paying the judgment against him, because the liability is fixed by the judgment, and he can only avoid payment by having the judgment reversed; hence, the payment is compulsory. For further discussion as to the right of either a plaintiff or defendant to appeal after satisfaction, see extended note to *State v. Conkling*, 45 Am. St. Rep. 270.

Absence from the state, though for several years, does not deprive one against whom a judgment has been rendered of his right to appeal therefrom: *Ricketson v. Torres*, 23 Cal. 636. Nor does the fact that a party aggrieved by a judgment is in contempt of court deprive him of his right to appeal: *Palmer v. Palmer*, 28 Fla. 295, 9 South. 657; *People v. Horton*, 46 Ill. App. 434; *State v. Field*, 37 Mo. App. 83; *Hazard v. Durant*, 11 R. I. 195.

Though in *Lansdown v. Lansdown*, 12 Ky. Law Rep. 509, the defendant in a divorce suit was denied the right to appeal from a judgment

awarding the custody of the children to the plaintiff, until he purged himself of contempt in refusing to deliver the children to the plaintiff in obedience to the order of the lower court.

d. Claimants as Appellants.—Where one, not an original party to the suit, asserts title to the property involved, and appears to maintain his title, he is entitled to appeal from a judgment adverse to his claim, provided he has a personal interest affected by the decree: *Cooper v. Jones*, 24 Ga. 473; *Crawford v. Shriver*, 139 Pa. 239, 21 Atl. 518. But the mere filing of claims by creditors with a receiver is not sufficient, for they have no such direct interest injuriously affected by the judgment as entitles them to a right of review: *Scott v. Great Western Coal & Coke Co.*, 223 Ill. 271, 79 N. E. 53.

Where money paid into court by a third person is sought to be recovered by two claimants who interplead, either can appeal from a judgment although he is not mentioned in the decree: *Brooks v. Doxey*, 72 Ind. 327. But it has been held that where a claimant who is not an original party to the suit claims by paramount title, that he cannot appeal from a decree establishing the rights of the original parties: *Swackhamer v. Kline's Admr.*, 25 N. J. Eq. 503; *Raleigh v. Rogers*, 25 N. J. Eq. 506; *Hemmenway v. Corey*, 16 Vt. 225. These decisions are based on the theory that if the claimant's title was paramount, that his title would not be affected by the decree. But in *Bass v. Fontelroy*, 11 Tex. 698, it is held that a party whose title is put in doubt by a decree is an aggrieved party, and entitled to have the decree rendered, although the decree does not impair his title.

e. Garnishees as Appellants.—Garnishees have no interest in the merits of the controversy, and therefore if they are protected by the judgment rendered—i. e., if the judgment is a valid one—they have no right to appeal from a judgment in the original action on account of mere errors or irregularities: *Exchange Bank v. Freeman*, 89 Ga. 771, 15 S. E. 693; *Earl v. Matheney*, 60 Ind. 202; *Hanna's Syndico v. Luring*, 10 Mart. (La.) 568, 13 Am. Dec. 339; *Alma Ice Co. v. Yancey*, 66 Tex. 187, 18 S. W. 499; *Durk v. Scully*, 41 Wash. 357, 83 Pac. 426.

f. Interveners as Appellants.—As a general rule, one who is allowed by the court to intervene in an action is entitled to appeal from any judgment or decree rendered therein. Thus if a judgment creditor is permitted to intervene, and does intervene in an action after a receiver has been appointed, and moves to set aside the order appointing the receiver and dismiss the proceedings, he can appeal from an order denying his motion and overruling his motion for a new trial: *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585. But where a petition for leave to intervene has been denied, the party petitioning cannot appeal from the final judgment: *People v. Pfeffer*, 59 Cal. 89; *Lorber v.*

Connor, 82 Iowa, 739, 47 N. W. 1006; Shackleford's Admx. v. Gates, 35 Tex. 781. If his petition is improperly denied, however, as where one sued as a casual ejector was refused leave to plead, he can appeal from a default judgment against him: Phelps v. Long, 31 N. C. 226. And where a party's petition for leave to intervene is denied, he can appeal immediately from the order denying his petition without awaiting the action of the court on the matters involved in the main cause: Thornton v. Highland Ave. etc. R. Co., 94 Ala. 353, 10 South. 442; Stich v. Dickinson, 38 Cal. 608; Hall v. Jack, 32 Md. 253; Keatley v. Branch, 84 N. C. 202.

g. Corporations as Appellants.—A corporation is not entitled to appeal from a judgment which is prejudicial only to its stockholders, if they were parties to the action: Board of Liquidation v. New Orleans Water Works Co., 39 La. Ann. 202, 1 South. 445. But where the stockholders of a corporation were not parties to the suit, it has been held that an appeal from a judgment which injuriously affected the interests of such stockholders could be taken by the corporation: Republic L. Ins. Co. v. Swiegert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328. But this doctrine is denied in Dennis v. Table Mountain Water Co., 10 Cal. 369. In this case a decree was rendered against a corporation foreclosing a mortgage duly executed in behalf of the corporation by its president and secretary, and the decree provided for the sale of the right, title and interest of the said president and secretary of the corporation, naming them, with deficiency judgment against the corporation. The corporation appealed, and assigned as error that the decree was in part against the president and secretary, who were not named as parties to the suit and were not served with process. The court held that the corporation could not take advantage of the error.

h. Sureties as Appellants.—Perhaps the most numerous class of persons in an individual capacity who were not parties to the suit, but who claim the right to appeal under the statutes as persons aggrieved, are sureties on official bonds. The decided weight of authority sustains the right of a surety on an official bond to appeal from a judgment against his principal, upon the theory that as the surety, in the absence of fraud or collusion, is bound by a judgment against his principal, he is a party aggrieved: Weer v. Gand, 88 Ill. 490; Mertz v. Melhop, 117 Ill. App. 77; Boyd Co. v. Rosa, 95 Ky. 167, 44 Am. St. Rep. 210, 25 S. W. 8; Farrar v. Parker, 3 Allen (Mass.), 556; Patterson v. Gathings, 48 Miss. 639; McCartney v. Garneau, 4 Mo. App. 567; Nolan v. Johns, 108 Mo. 431, 18 S. W. 1107; In re Switzer, 201 Mo. 66, ante, p. 731, 98 S. W. 461; Garber v. Commonwealth, 7 Pa. 265; Belcher v. Branch, 11 R. I. 226. In Mertz v. Melhop, 117 Ill. App. 77, the surety on a guardian's bond was permitted to appeal from an order restating the account of his principal as guardian of a minor. In McCartney v. Garnian, 4 Mo. App. 567, it is held that the sureties on the bond of an administrator

of a partnership can appeal from the final settlement by a surviving partner in the probate court, because such settlement has the effect of a judgment and is binding on the sureties.

Nolan v. Johns, 108 Mo. 431, 18 S. W. 1107, is a leading case upholding the right of sureties to appeal, and will be found referred to as authority in most of the later cases on this question. "The first question that confronts us," said the court, "on this record is whether the sureties on an injunction bond have the right to prosecute an appeal from a judgment rendered on the bond for damages against the principal alone, in a summary proceeding, in the original case upon motion. The statute (Rev. Stats. 1879, sec. 3710) gave the right of appeal to 'every person aggrieved by a final judgment or decision of any circuit court in any civil cause.' It is clear that it was not intended that the right of appeal should be limited to persons who were technically parties to the suit, and against whom judgment was directly rendered. 'Every person aggrieved' includes every person whose rights were in any respect concluded by the judgment. The use of the designation 'person' instead of 'party,' in a chapter of the statute treating exclusively of practice and proceedings in civil cases, is itself suggestive that others than those technically parties to a suit and judgment should have the right of appeal. Furthermore, it is right and just that any person whose interests are injuriously affected and concluded by a judgment should have the right to a review, by the appellate court, of the proceedings which resulted in such judgment." While the reasoning given in this case has appealed to the judgment of most of the courts, there are some cases which assert a different doctrine.

Perhaps it should be here remarked that the statute of Missouri considered in the above quotation has been amended, and now declares that "any party to a suit aggrieved," etc. It was said in Wauchope v. McCormick, 158 Mo. 660, 59 S. W. 970, that this amendment did not operate to abridge, but rather to extend, the right of appeal. In our judgment, the case in which this language was used was not one requiring the consideration of the question, and hence that what the court said cannot be implicitly relied upon when an appeal is taken by a person in no sense a party to the order appealed from, though injuriously affected thereby.

In Lake Bisteneau Lumber Co. v. Minns, 49 La. Ann. 1294, 22 South. 735, the surety on an injunction bond was denied the right to appeal from a judgment which dismissed the case for want of prosecution. And in Woodbury v. Hammond, 54 Me. 332, it was held that the surety on a guardian's bond could not appeal from the decree of a probate judge allowing a guardianship account filed by the administrator of the deceased guardian, and this decision is reaffirmed in Tuxbury's Appeal, 67 Me. 267. In Shaw v. Humphrey, 96 Me. 397, 90 Am. St. Rep. 349, 52 Atl. 798, the doctrine is laid down that a surety upon a probate bond has no right to appeal from a

decree of the probate court allowing or disallowing the account of his principal.

1. Creditors as Appellants.—As a general rule, a judgment creditor has no right to appeal from a judgment rendered against his debtor: *India Rubber Co. v. Smith*, 75 Ill. App. 222; *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43; *Black v. Kirgan*, 15 N. J. L. 45, 28 Am. Dec. 394; *Sherer v. Collins*, 17 N. J. L. 181; *Gales v. Bank of Plankinton*, 13 S. Dak. 622, 84 N. W. 192. But this rule applies only when the judgment creditor is not made a part to the suit: *Barker v. Barker*, 39 N. H. 408; *Attorney General v. North American Life Ins. Co.*, 77 N. Y. 297. And if he is a quasi party—that is, required to come in and prove his claim during the progress of the settlement of an estate—the rule does not apply: *Pearson v. Darrington*, 32 Ala. 227. It is also held in *Derrick v. Lamar Ins. Co.*, 74 Ill. 404, that the right of appeal exists in a creditor who has appeared before a master in chancery and excepted to a disallowance of his claim. And in *Columbia Finance Co. v. Morgan*, 19 Ky. Law Rep. 1761, 44 S. W. 389, 628, 45 S. W. 65, it is stated that creditors interested in the distribution of funds, control of which is involved in the suit, have the right of appeal. This principle is also supported in *Adkin v. Baker*, 7 Ga. 56; *Hayward v. Graham Book etc. Co.*, 59 Mo. App. 453; *National Bank v. Sprague*, 21 N. J. Eq. 458; *Blake v. Domestic Mfg. Co. (N. J.)*, 38 Atl. 241; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. Rep. 638, 28 L. ed. 559.

III. Persons in Representative Capacity.

a. Administrators as Appellants.—In some cases the broad statement is made that an administrator can appeal from a judgment against the decedent: *Davis v. Nichols*, 52 Ark. 554, 13 S. W. 129; *Webster v. City of Hastings*, 56 Neb. 245, 76 N. W. 565. But in *Goldschmidt v. Meline*, 86 Md. 370, 38 Atl. 783, it is held that the personal representative of a deceased cannot prosecute an appeal from a judgment rendered against the deceased when no appeal had been entered by the deceased himself before his death. However, in *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276, a decedent left nothing with which to pay a debt he owed at the time of his death except certain land, which had been obtained from him by fraud. He had begun suit before his death to have the fraudulent conveyance set aside, but had not appealed from an adverse judgment against him. It was held that the administrator could prosecute an appeal from such decree.

In *Re Clark's Estate*, 79 Vt. 62, 118 Am. St. Rep. 938, 64 Atl. 231, an administrator de bonis non was ordered to pay to one of the distributees a certain sum of money. The administrator could not find the distributee, he being reported dead and an administrator had been appointed for the estate. The administrator de bonis non claimed that the distributee was still alive, and he was allowed to

appeal from the order appointing an administrator for his estate. The reasons given by the court for allowing this appeal were, that if the distributee should turn out to be alive at the time administration on his estate was granted, the appointment of an administrator would be void, and if the administrator de bonis non should pay the money to him, he would not be protected against the supposed intestate, nor against an administrator appointed after his death in case the real administrator should sue for the distributive share. It was therefore decided that the administrator need not wait until he was sued, but was entitled to raise the question in limine by appealing from the appointment, and thus save himself from a twofold enlargement of his liability.

In *Wiggin v. Swett*, 6 Met. (Mass.) 194, 39 Am. Dec. 716, it is held that an administrator de bonis non can appeal from a decree allowing the account of his predecessor. And he may also appeal from a judgment against the former administrator or executor: *Stontz v. Huger*, 107 Ala. 248, 18 South. 126.

It is also held that an administrator can appeal from an order fixing his compensation less than it should be: *Parker v. Gwynn*, 4 Md. 423. But he cannot appeal from a decree of the probate court authorizing an action on his bond, for the reason that he is not thereby concluded from asserting and defending any claims or property rights in any proper court: *Sherer v. Sherer*, 93 Me. 210, 74 Am. St. Rep. 339, 44 Atl. 899. And after an administrator has been discharged, his right of appeal no longer exists. The reason for this is forcibly expressed in *McCormick Harvesting Machine Co. v. Snedigar*, 3 S. Dak. 302, 53 N. W. 83. In this case a judgment had been obtained against an administrator who was subsequently discharged and thereafter appealed. The court said: "The motion to dismiss the appeal must be allowed. . . . Suppose we retain this case, and, upon hearing, render judgment against the appellant; who is bound? Not the estate of Tuttle, for we know, and it is admitted, that Whitney, the nominal appellant who brought the appeal, has no authority to appear for the estate, and that we get no jurisdiction over it. Not Whitney himself, for his notice informs us at the outset that he appeals only in a representative capacity. As administrator, Whitney was dead when, and long before, the appeal was taken. An appeal taken in the name of a dead person gives the appellate court no jurisdiction." In *Strong v. Peters*, 212 Ill. 282, 72 N. E. 369, an administrator was denied the right to appeal from a decree refusing to remove a cloud from title to land owned in fee by the decedent, for the reason that having no legal interest in the subject matter the administrator could not maintain such a bill in the lower court, and hence could not appeal from the decree rendered therein.

b. Executors as Appellants.—There are cases which hold that an executor can appeal from any judgment which affects the property

of his testator: *Levy v. Williams*, 9 Rich. (S. C.) 153; *In re Luscombe's Will*, 109 Wis. 186, 85 N. W. 341. But he cannot appeal from a decree affecting title to lands which have vested in the heirs: *Bowen v. Grayville & M. R. Co.*, 92 Ill. 223; *Turner v. Waters*, 14 Md. 62. Nor can he appeal from a decree of distribution when the court had jurisdiction: *Matter of Williams*, 122 Cal. 76, 54 Pac. 386; *Chew's Appeal*, 3 Grant Cas. (Pa.) 308. He may appeal, however, from an order directing payment of a preferred claim when the estate is insolvent and the amount of the distributable estate has not been ascertained: *In re Smith*, 117 Cal. 505, 49 Pac. 456. And he can appeal from a judgment rendered in an action brought by him: *Bliss v. Fosdick*, 76 Hun, 508, 27 N. Y. Supp. 1053. But when a suit was brought against an executor and judgment rendered against him as such, he could not appeal individually unless he had made himself as an individual a party to the action: *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706.

c. **Heirs at Law as Appellants.**—An heir at law of a decedent is a party aggrieved by a judgment affecting the title or possession of real property belonging to the estate of such decedent, and is entitled to appeal therefrom: *Bowen v. Grayville & M. R. Co.*, 92 Ill. 223; *Bates v. Sargent*, 51 Me. 423; *Betts v. Shatton*, 27 Wis. 667. But the rule seems to be limited, for in *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43, it is held that an heir at law cannot appeal from a mere personal judgment against the decedent's estate, although the estate is insolvent, and a sale of the real property belonging to the estate would be necessary in order to satisfy the judgment.

d. **Guardians and Next Friends as Appellants.**—A guardian has such an interest in a judgment affecting the estate of his ward as entitles him to appeal therefrom: *In re Johnson*, 87 Iowa, 130, 54 N. W. 69. And in *Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091, the same rule is applied to a guardian ad litem. So, too, if an infant has neither a guardian or a guardian ad litem, his next friend can appeal from a judgment affecting the minor's interest: *Cook v. Adams*, 27 Ala. 294. But otherwise if he has a guardian or guardian ad litem: *Lawless v. Reagan*, 128 Mass. 592. In *King v. McLean Asylum*, 64 Fed. 325, 12 C. C. 1. 139, 26 L. R. A. 784, the next friend of an insane person who had no guardian was allowed to appeal from a judgment affecting the incompetent's interest.

e. **Assignees in Insolvency as Appellants.**—The assignee of an insolvent debtor has such an interest in a judgment injuriously affecting the estate of the bankrupt that he can appeal therefrom: *Johnson v. Thaxter*, 12 Gray (Mass.), 198; *Day v. Laffin*, 6 Met. (Mass.) 280. But where the judgment was rendered prior to the execution of the deed of assignment, neither the assignee nor the creditor being parties to the suit, the assignee was not entitled to appeal: *Johnson v. Louisville City Nat. Bank* (Ky.), 56 S. W. 710. And an assignee

cannot appeal either in his own right, as assignee or on behalf of creditor from a decree distributing the funds in his hands, for he has no beneficial interest therein: *Mellon's Appeal*, 32 Pa. 121; *In re Graff*, 146 Pa. 415, 23 Atl. 397. Though in *Salmon v. Pierson*, 8 Md. 297, it is held that an assignee can appeal from a decision which affects all the creditors, by diminishing the funds from which they are to be paid, or which prevents him attempting to increase such funds by recovering property which he thinks belongs to the insolvent estate, and he is also entitled to appeal from an order distributing the fund if it affects his allowance for commissions or expenses. An assignee can also appeal from an order removing him and directing him to turn over the assets to his successor: *Teackle v. Crosby*, 14 Md. 14; *State v. Field*, 37 Mo. App. 83.

f. Trustees as Appellants.—A trustee of property is a person aggrieved by a judgment or decree affecting the interest of his cestui que trust, and is entitled to appeal therefrom on his behalf: *Woodside v. Graffin*, 91 Md. 422, 46 Atl. 968; *Bocks v. Hathorn*, 78 N. Y. 222; *Hall v. Bank of Virginia*, 14 W. Va. 584. But a conventional trustee appointed by deed to sell property and distribute the proceeds among creditors cannot appeal from an order fixing the amount of the claim of a judgment creditor, for that is a matter in which he has no concern: *McColgan v. McLaughlin*, 58 Md. 499. Nor could he appeal from an order setting aside a sale which he had reported for ratification: *Hallam v. Oppenheimer*, 3 App. Cas. (D. C.) 329.

g. Receivers as Appellants.—A receiver being a mere officer of the court cannot, as a general rule, appeal from an order in the action unless he is first authorized to do so by the court. Thus, where a receiver was directed by order of court to turn over to his predecessor, who had resigned, a portion of the fund and appealed, the court in dismissing his appeal said: "A receiver is a mere officer of the court. His first duty is to obey its orders. He has no discretion, speaking generally, as to the application of funds which are in his hands by virtue of the receivership. He holds them strictly subject to the order of the court, to be disposed of as the court may direct. Being a mere agent of the court, he has no authority to appeal from orders made by it in the pending proceeding, except as it may authorize him to so do. The exception is that he has the right to appeal in all matters relating to his official conduct or his accounts and credits. In these cases he occupies the position of a party to a suit; and his right of appeal from judgments rendered against him in other proceedings, of course, is the same as that of any other party": *Polk v. Johnson* (Ind. App.), 76 N. E. 634. To the same effect is *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436.

In *Foreman v. Defreess*, 120 Ill. App. 486, and *Battery Park Bank v. West Carolina Bank*, 127 N. C. 432, 37 S. E. 461, it is announced that a receiver cannot appeal from an order directing the payment of

funds in hands. These decisions are based on the theory that the contest is between the creditors, and that the receiver is protected by the order of the court. But in *People v. Saint Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 421, it is held that a receiver is a party aggrieved by an order directing him to pay out money in his hands to claimants who had brought him into court to obtain an order that he pay them a large sum of money in his hands, the payment of which he opposed. "Under such circumstances," said the court, "where the claimants, and not the receiver, apply for summary relief, and this is granted, notwithstanding the opposition of the receiver and the interests which he represents, we fail to see why the receiver is not, within the meaning of section 1294 of the code, a party aggrieved and thus having the right to appeal."

In *Rust v. United Water Works*, 70 Fed. 129, 17 C. C. A. 16, it is held that a receiver could appeal from a default judgment against a corporation for which he had been appointed receiver when his petition for leave to come in and defend was denied. But he cannot appeal from a judgment rendered against a party for whose effects he was appointed, when the action was begun before his appointment, unless he first has himself made a party of the suit: *Dupree v. Drake*, 94 Ga. 456, 19 S. E. 242.

A receiver can appeal from an order setting his accounts: *Herndon v. Heirten*, 19 Fla. 397; *Foreman v. Defreess*, 120 Ill. App. 486; *Polk v. Johnson* (Ind. App.), 76 N. E. 634; *Hobart v. Hobart*, 23 Hun (N. Y.), 484. A receiver has no vested right of office, hence cannot appeal from an order removing him or vacating his office, for the parties to the action or intervening creditors would be the only persons aggrieved by his removal: *In re Premier Cycle Mfg. Co.*, 70 Conn. 473, 39 Atl. 800; *L'Engle v. Florida Central R. Co.*, 14 Fla. 266; *Elliot v. Waford*, 4 Md. 80. But he can appeal from an order fixing the compensation for his services less than it should be: *Hobart v. Hobart*, 23 Hun (N. Y.), 484.

h. Attorneys as Appellants.—The general rule is that an attorney cannot in his own name and on his own motion appeal from a judgment or decree affecting the interest of his client: *National Park Bank v. Lanahan*, 60 Md. 477; *Dickinson's Appeal*, 2 Mich. 337; *Taff v. Hosmen*, 14 Mich. 249. And this principle is also upheld in *Besancon v. Brownson*, 39 Mich. 388.

i. Officer of a Board of Trade as Appellant.—An interesting case showing the extent to which the right of appeal has been allowed the officers of incorporated commercial bodies is furnished by the supreme court of Illinois in *Pacaud v. Waite*, 218 Ill. 138, 75 N. E. 779, 2 L. R. A., N. S., 672, where the president of the board of trade of Chicago, who was made a party to a suit as a representative of the board, was allowed to appeal from a decision adverse to the by-laws of the board.

IV. Persons not Parties to the Suit or Proceeding.

a. Whether Entitled to Appeal.

1. **General Rule.**—Both by the common-law practice and that obtaining in chancery, a writ of error could be prosecuted or an appeal taken only by a party, and this is the rule both in the courts of the United States and in those of all the states purporting to give a right to appeal or to prosecute a writ of error to any party aggrieved. Under these statutes, third persons, no matter how much they may be prejudiced by the judgment, decree, or order, cannot obtain its review by appeal or writ of error: *Dupree v. Perry*, 18 Ala. 34; *Clemens v. Patterson*, 38 Ala. 721; *May v. Courtney*, 47 Ala. 185; *Hunt v. Houtz*, 62 Ala. 36; *Roden v. Jaspar*, 122 Ala. 374, 25 South. 198; *Johnson v. Williams*, 28 Ark. 478; *Arnett v. McCain*, 47 Ark. 411, 1 S. W. 783; *Holmes v. Morgan*, 52 Ark. 99, 12 S. W. 201; *Holford v. Kirkland*, 71 Ark. 84, 71 S. W. 274; *Turner v. Williamson*, 77 Ark. 586, 92 S. W. 867; *Montgomery v. Leavenworth*, 2 Cal. 57; *Callaghan's Estate*, 119 Cal. 577, 51 Pac. 860, 39 L. R. A. 689; *In re McDermott's Estate*, 127 Cal. 450, 59 Pac. 783; *Eyster v. Gaff*, 2 Colo. 225; *Fischer v. Hanna*, 21 Colo. 9, 39 Pac. 420; *Yudkin v. Gates*, 60 Conn. 426, 22 Atl. 776; *State v. Florida C. R. Co.*, 15 Fla. 690; *Pensacola v. Reese*, 20 Fla. 437; *Townsend v. Davis*, 1 Ga. 495, 44 Am. Dec. 675; *Swift v. Thomas*, 101 Ga. 89, 28 S. E. 618; *Murray v. Tarver*, 127 Ga. 378, 46 S. E. 417; *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665; *State v. Jones*, 11 Iowa, 11; *Borgalthous v. Farmers' & M. Ins. Co.*, 36 Iowa, 250; *Ferguson v. Board of Supervisors*, 44 Iowa, 701; *Davidson v. Bush*, Hard. 201; *Stevens' Heirs v. Stevens' Widow*, 2 Dana (Ky.), 428; *Cosby v. Lynn's Heirs*, 4 Bibb, 249; *McKin v. Mason*, 3 Md. Ch. 186; *Besancon v. Brownson*, 39 Mich. 388; *Hollingshead v. Banning*, 4 Minn. 116; *Beazley v. Prentiss*, 13 Smedes & M. 97; *Starling v. Flash (Miss.)*, 16 South. 875; *Peterson v. Martin*, 60 Neb. 577, 83 N. W. 831; *Large v. Nott (Neb.)*, 95 N. W. 484; *State v. Bloomfield State Bank (Neb.)*, 95 N. W. 791; *People v. Sanborn*, 46 App. Div. 630, 61 N. Y. Supp. 529; *Siler v. Blake*, 3 Dev. & B. (20 N. C.) 90; *Reid v. Quigley*, 16 Ohio, 445; *Witte v. Clarke*, 17 S. C. 313; *Wood v. Yarbrough*, 41 Tex. 540; *Stephenson v. Texas & P. R. R. Co.*, 42 Tex. 162; *Wingfield v. Crenshaw*, 3 Hen. & M. 245; *Edmunds' Admr. v. Scott*, 78 Va. 720; *Southern Ry. Co. v. Glenn's Admr.*, 102 Va. 529, 46 S. E. 776; *Payne v. Niles*, 20 How. 219, 15 L. ed. 895; *Ex parte Cockcroft*, 104 U. S. 578, 26 L. ed. 856; *Indiana S. R. R. Co. v. Liverpool L. & G. I. Co.*, 109 U. S. 168, 3 Sup. Ct. Rep. 108, 27 L. ed. 895; *The Spark v. Lee Choi Chum*, 1 Saw. 713, Fed. Cas. No. 13,206; *Buel v. Farmers' L. & T. Co.*, 104 Fed. 839, 44 C. C. A. 213.

The term "parties," however, is not restricted to those who are named in the pleadings, nor even to those named in the final judgment or decree. At various stages of the proceedings persons who are not original parties thereto may be brought in, or may come in

on their own motion, for the purpose of seeking, or being subjected to, some relief, and when such is the case, they become parties, at least to the proceeding affecting them, and if the order made against them is otherwise appealable, they may appeal as parties: *Arnold v. Carter*, 19 App. D. C. 259.

Thus, when one's rights become involved as a creditor presenting his claim against the estate of a bankrupt or insolvent or of a decedent whose estate is in process of administration, or otherwise for the purpose of participating in a fund in court, and he presents his claim or allowance, he thereby makes himself a party for the purposes of his claim and becomes entitled to appeal from orders prejudicial to his interest: *Wallace v. Chicago & E. S. Co.*, 46 Ill. App. 571; *Hayward v. Graham B. & S. Co.*, 59 Mo. App. 453; *National Bank v. Sprague*, 21 N. J. Eq. 458; *De Ruyter v. St. Peters' Church*, 3 Barb. Ch. 119; *Martin v. Kanouse*, 2 Abb. Pr. 390; *Matter of Bristol*, 16 Abb. Pr. 397; *Feamster v. Withrow*, 9 W. Va. 296; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. Rep. 638, 28 L. ed. 559. So if property is sold at a judicial sale, the purchaser becomes thereby a party to the suit for all purposes involving his purchase, and may therefore appeal from an order confirming or setting aside the sale: *Boland's Estate*, 55 Cal. 310; *Flournoy v. Smith*, 3 How. (Miss.) 62; *Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970; *Penn M. I. Co. v. Creighton I. Co.*, 51 Neb. 659, 71 N. W. 279; *Davis v. Stewart*, 4 Tex. 223; *In re Auerbach's Estate*, 23 Utah, 529, 65 Pac. 488; *Greiling v. Watermolen*, 128 Wis. 440, 107 N. W. 339; *Kneeland v. American L. & T. Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950, 34 L. ed. 379. The purchaser may apply for a writ of assistance to place him in possession of the property purchased, in which event he and the person against whom he seeks relief both become parties to that proceeding, and as such entitled to appeal: *Thompson v. Campbell*, 57 Ala. 183. So persons may be made parties by virtue of proceedings in garnishment and as such become entitled to appeal from orders affecting their rights, but a mere claimant of money garnished, who does not become a party to the proceedings, cannot appeal: *Borgalthous v. Farmers' & M. I. Co.*, 36 Iowa, 250; *Hollingshead v. Banning*, 4 Minn. 116.

2. **Statutes Extending the Right to Persons not Parties.**—By section 571 of the Code of Procedure of Louisiana the right of appeal is given not only to parties to a judgment, but further, to such third persons as allege and show that they are aggrieved, and establish their grievance by affidavit in the lower court or on appeal: *State v. Judge*, 23 La. Ann. 768; *Louisiana Mutual I. Co. v. Costa*, 32 La. Ann. 1; *Fazende v. Flood*, 24 La. Ann. 425; but the appeal cannot be sustained if the claim of the third person is not contained in the record, and new evidence must be adduced to sustain it and to show that the judgment is erroneous: *State v. Judge*, 13 La. Ann. 199. We do not know of any other state whose statutes proceed so far in

this direction. In proceedings in probate involving the settlement of estates of decedents, the establishment of wills, and the distribution of the property, executors, administrators, administrators de bonis non, heirs, legatees and creditors, though not formal parties, are doubtless such in contemplation of law, and may appeal, but in several of the states all doubt on this subject has been removed by statutes purporting to extend the right of appeal in probate to all persons aggrieved: *Williams v. Cleaveland*, 76 Conn. 426, 56 Atl. 850; *Dickerman's Appeal*, 55 Conn. 223, 10 Atl. 194, 15 Atl. 199; *Sturtevant v. Tallman*, 27 Me. 78; *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649; *Rankin v. Sherwood*, 33 Me. 509; *Farrar v. Parker*, 3 Allen, 556; *Smith v. Bradstreet*, 16 Pick. 264; *In re Lee*, 18 Pick. 285; *Pierce v. Gould*, 143 Mass. 234, 9 N. E. 568; *Robinson v. Dayton*, 190 Mass. 459, 77 N. E. 503; or to a person interested who considers himself injured: *In re Clark's Estate*, 79 Vt. 62, 118 Am. St. Rep. 938, 64 Atl. 231. In Missouri, as shown in the principal case, a like result is brought about by a statute providing that the right of appeal in cases involving the administration of estate shall extend to any heir, devisee, legatee, creditor, or other person having an interest in the estate under administration. In New York, by section 2659 of the Code of Civil Procedure, a creditor or person interested in the estate or fund affected by the decree or order of the surrogate court who was not a party to the special proceeding, but was entitled to be heard therein, may appeal. He must show by affidavit the facts entitling him to do so: *In re Sullivan*, 84 App. Div. 51, 82 N. Y. Supp. 32. In Illinois, any person aggrieved may appeal from the county to the circuit court: *Weer v. Gand*, 88 Ill. 490. In a recent Wisconsin decision the broad declaration was made that "the supreme test of whether a person has a right to appeal to this court is whether he has a substantial interest adverse to the adjudication sought to have reviewed, not whether he was a party as appears by the record of the trial"; but when the facts of the case are considered, it appears that this revolutionary language was only intended to affirm that distributees of an estate could review a judgment establishing a claim against it which, if enforced, would diminish their rights: *Hinn v. Gersten*, 122 Wis. 222, 99 N. W. 338. Persons who by consent of the nominal parties to an action or proceeding appear and assume its defense and whose rights are necessarily determined by the judgment rendered therein have the right to appeal: *Andrews v. Thum*, 64 Fed. 149, 12 C. C. A. 77; but in so doing, we assume they employ the names of the nominal parties.

b. **How Their Right to Appeal must Appear.**—With the exceptions hereinbefore referred to from the Codes of Civil Procedure of Louisiana and of New York, there is no provision of statute directly pointing out how the persons not parties to the suit or proceeding may show themselves entitled to appeal from the judgment or order therein. Under these codes their claim of the right of appeal may be presented

to the court by affidavit, but whether there may be counter-affidavits, and if so, when, how and by whom the issue formed by them shall be tried and determined, is not directly stated in the statute. Independently of any express statutory provision upon the subject, it must be that one claiming the right to appeal merely as an interested person must in some way become in effect, if not in name, a party to the proceeding. He can generally do this by some motion in the trial court presenting his claim for consideration, in support of which he offers evidence. When he does so, he becomes entitled to appeal if the decision is against him: *Adams v. Woods*, 8 Cal. 335; *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703; *Malone v. Big Flat M. Co.*, 93 Cal. 384, 28 Pac. 1063. At all events, it may safely be assumed that no person not a formal party to the action or proceeding can prosecute a writ of error or an appeal merely by claiming that he is an aggrieved person. Whether he is such a person is a matter which he must establish to the satisfaction of the appellate court to the same extent that he must demonstrate to it that the judgment or order assailed is erroneous: *The Constitution v. Woodworth*, 1 Scam. 511; *Consolidated R. R. Co. v. Surwalt (Ill.)*, 37 N. E. 909; *Phillips v. Shelton*, 6 Iowa, 545; *Cosby v. Lynn's Heirs*, 4 Bibb, 249; *Lacroix v. Menard*, 7 Mart., N. S., 345; *Bland v. Edwards*, 52 La. Ann. 822, 27 South. 289; *Briard v. Goodale*, 86 Me. 100, 41 Am. St. Rep. 526, 29 Atl. 946; *Penniman v. French*, 2 Mass. 140; *Nolan v. Johns*, 108 Mo. 431, 18 S. W. 1107; *In re Switzer*, 201 Mo. 66, ante, p. 731, 98 S. W. 461.

PRIDDY v. BOICE.

[201 Mo. 309, 99 S. W. 1055.]

JURISDICTION, Loss of by Change of Venue.—When, upon application duly made, a cause is transferred to another judge for trial, the transferring judge loses jurisdiction and cannot afterward make further orders. (p. 771.)

CHANGE OF PLACE OF TRIAL, Application for must be Supported by Evidence.—If an application is made to change the place of trial to another division of the court on the ground that all the judges are prejudiced, and the application being brought on for hearing before one of the judges, the moving parties decline to offer evidence on the ground that he will not consider it, notwithstanding he is present and offers to hear such evidence, he may properly deny a change of the place of trial as to all the judges other than himself. (p. 771.)

APPEAL AND ERROR—Abstract Failing to Show the Error Complained of.—If an appeal is by what is known as the short method, and the point made in the briefs is that the court erred in excluding competent evidence, the supposed error cannot be considered where it is not supported by the abstract. (p. 772.)

EVIDENCE.—Age of Members of Families—Certified Copies of Schedules Taken by an Officer of the United States and Forming Part of the Records of the Census taken at different dates are admissible for the purpose of showing the ages of the members of a family whose ages purport to be stated therein. (pp. 774-778.)

APPEAL AND ERROR.—Where the Abstract on Appeal Fails to Show That an Objection was Made to Evidence and an Exception Reserved to its admission, any supposed error in admitting it cannot be considered on appeal. (p. 779.)

APPEAL AND ERROR—Decree Canceling Power of Attorney, When not Error.—A decree that a certain power of attorney authorizing an action to be brought for the lands in controversy be set aside, and held of no effect, will not be reversed on the ground that such power embraces lands other than those in controversy. (p. 780.)

INFANTS—Limitations—When not Continued by Marriage.—If a woman not yet of age executes a conveyance, but remains unmarried until more than a year after attaining her majority, she should have disaffirmed the conveyance before her marriage, or, at least, not having done so, the statute of limitations must be regarded as running against her notwithstanding her subsequent marriage. (p. 780.)

EVIDENCE OF AGE.—The Mutilation of a Tombstone and the Absence of a Family Record once in the Bible must be regarded as suspicious, and evidence thereof is admissible. (p. 781.)

Samuel P. Forsee, William C. Forsee and H. H. McCluer, for the appellants.

C. O. Tichenor, O. H. Dean and Lathrop, Morrow, Fox & Moore, for the respondent.

320 GRAVES, J. In this action the petition is in two counts. The second count is an ordinary petition in ejectment. The first count is lengthy, but the salient facts pleaded are as follows: that Thomas Jones died in Jackson county, Missouri, in 1843, leaving nine minor children and a widow; that among these children were Nancy Jones and Elizabeth Jones; that Nancy married James J. Priddy in 1850; that in about the year 1854 Elizabeth, yet a minor, married William Linvill; that Thomas Jones at the time of his death was seised of lands in Jackson county, Missouri, of which there was a tract of land (minutely described in the petition) which was duly assigned to Martha Jones, ³²¹ his wife, for life in lieu of dower in all his lands; that Martha, the widow of Thomas Jones, died in 1868; that James J. Priddy died in July, 1896; that his wife, Nancy, died April 10, 1892; that Elizabeth Linvill died November 3, 1892; that William Linvill is still living; that Martha Jones held possession of this tract of land until her death in 1868; that on May 5, 1853, Nancy Priddy and her husband and Elizabeth Jones executed a deed to Lott Coffman in which they attempted to convey all their interest

(being a two-ninths interest) in said lands to said Coffman; that at the date of said deed both Nancy and Elizabeth were under the age of twenty-one years; that long before the beginning of the suit, the plaintiffs, who are lineal descendants of Nancy and Elizabeth, disaffirmed the said deed and gave record notice thereof; that both Nancy and Elizabeth disaffirmed said deed prior to their death; that the plaintiffs now so disaffirm said deed and claim a two-ninths interest in the land mentioned in said deed; that the land sued for and involved in this suit is a part of the tract held by Martha Jones aforesaid; that said land involved in this action is in the possession of the defendant Boice, who denies that plaintiffs have any interest therein; that Elizabeth Jones was married to William Linvill while yet under twenty-one years old; that in 1852, James J. Priddy conveyed his estate by curtesy to Lott Coffman; that immediately after executing the deed in 1853, Priddy and wife and Elizabeth Jones removed from Missouri and never thereafter returned.

These are the substantial facts in the first count of the petition. There are allegations showing the relationship of the parties plaintiff to Nancy Priddy and Elizabeth Linvill, and allegations as to the minority of some and the due appointment of the next friend named in the petition. By the prayer of the petition ³²² the court is asked to ascertain, determine and declare the interest of all parties to the action in and to the real estate involved in the suit, which is particularly described, and to declare said deed from Nancy Priddy and husband and Elizabeth Jones to Lott Coffman to be void and of no effect, and for such other and further relief as to the court may seem proper.

The answer in the first count thereof is a general denial.

In the second count of the answer the thirty-year statute of limitations is invoked.

By the third count of the answer the defendant avers the deed from Nancy Priddy and husband and Elizabeth Jones to have been executed after Nancy Priddy was more than twenty-one years of age, and at a time when Elizabeth Jones was married and of lawful age, and that the said Elizabeth Jones became twenty-one years of age long before her marriage, and at no time disaffirmed said deed, although more than a reasonable time for that purpose had elapsed after she had reached her majority and before her marriage.

By the fourth count of the answer is alleged the great advance in value of the whole property, of which the property in dispute forms a part; and the numerous valuable improvements put on all of the property, formerly in the possession of Martha Jones, as well as on the portions thereof in dispute. It is further alleged that all this was done with the knowledge of the plaintiffs and their ancestors, and for that reason there has been laches, and plaintiffs are estopped from claiming title.

The fifth count of answer is in the nature of a cross-bill, wherein it is contended that the claim of plaintiffs and two certain powers of attorney given by Mrs. Priddy and husband and Mrs. Linvill and husband to S. P. Forsee are clouds upon defendant's title. The prayer in said count is as follows:

323 "Wherefore, this defendant prays for the order and decree of this court adjudging that the title to the property in controversy is in this defendant free and clear of any claim on the part of these plaintiffs, and that the said deed made by James J. Priddy, Nancy A. Priddy and Elizabeth Jones in 1853 may be decreed to be the irrevocable deed of the said grantors, and that the plaintiffs be decreed to have no right title or interest in and to said property of this defendant, and for such other and further relief as may be equitable and just."

Reply was general denial, coupled with some other matter alleging notice of disaffirmance upon the part of Mrs. Priddy and Mrs. Linville, given by the record of the powers of attorney to S. P. Forsee.

The cause was pending in division one of the circuit court of Jackson county, over which Judge James Gibson was presiding. On November 5, 1902, plaintiffs filed application for a change of venue to some county other than Jackson, charging that each of the judges of the five several divisions of that court were prejudiced against plaintiffs, and that "the opposite party, the defendant herein, had an undue influence over the minds of each of said judges." Knowledge of said conditions was said to have been brought home to plaintiffs on November 4, 1902.

This motion was not disposed of until November 29, 1902. On November 4, 1902, it appears that Honorable Andrew F. Evans had been elected judge of division five to succeed Judge Teasdale, and he qualified on the twenty-ninth day of No-

vember, 1902. On November 22d, there was filed a voluminous motion asking Judge Gibson to take up and pass upon the application for change of venue. Notice was given that this last-named motion would be called up on November 24th. It is alleged that Judge Gibson refused to take it up on the 24th, and did not take it up until the 29th, at which time he ³²⁴ granted a change of venue to division number five. A lengthy colloquy between court and counsel is said to have taken place on the 29th, and is printed in the record, but in our view of the law of the case it is not necessary to set out these random shots.

On December 3, 1902, in division one, the plaintiffs filed a lengthy motion to strike out the following part of the order made on November 29th, which part said motion was leveled against is as follows:

“And doth order that the venue of this cause be changed from this court to division number five of the circuit court of Jackson county, Missouri, at Kansas City, which said division number five is now presided over by Honorable Andrew F. Evans, the regular judge thereof, to which action the court in sending said cause to said division number five, said plaintiffs except.”

This motion was taken up on December 6, 1902, and a mass of testimony, documentary and otherwise, taken and heard, which will be noticed in the course of this opinion if necessary. The motion was by Judge Gibson overruled.

Again on December 6th, after the disposition of the motion to strike out, plaintiffs filed in division number one a motion asking for leave to file an amended application, in which was included the name of Honorable Andrew F. Evans, as well as Honorable F. C. Farr, who was acting as special judge in division number four, Judge Henry, the regular judge, being sick.

This motion Judge Gibson refused to entertain, on the ground that his division of the court had lost jurisdiction.

Then follows a motion in division number five to remand the cause to division number one. This was overruled by Judge Evans.

At the January term, 1903, plaintiffs filed in division number five application for change of venue, alleging prejudice upon the part of all the judges of the court, ³²⁵ and prejudice of the inhabitants of the county of Jackson. This motion was likewise overruled by Judge Evans.

After running the gauntlet of these divers and sundry motions with the great mass of documentary and other evidence introduced thereon, the case was finally tried in division number five of the Jackson county circuit court at the January term, 1903, and taken under advisement until the April term, at which time a finding of facts was filed by Judge Evans, pursuant to request of both parties. This finding of facts is fully sustained by the evidence that was admitted by the court, although there are many sharp conflicts in the testimony.

The said finding of facts is as follows:

“Thomas Jones, deceased, died in the year 1843, seised of fifty-one and a fraction acres of land in Jackson county, Missouri; the land described in the petition in this case, as follows, beginning at the northwest corner of Independence Boulevard and Wabash avenue, thence north 172.75 feet, thence west 143 feet, thence south 172.75 feet, thence east 143 feet, to the place of beginning, in Kansas City, Jackson county, Missouri, is a portion of the land above described of which said Thomas Jones died seised and intestate, leaving surviving him his widow, Martha Jones, and nine children, James W. Jones, Nancy Jones, Mary Jones, Elizabeth Jones, Thomas Dudley Jones, Emily Jones, Caroline Jones, Benjamin Jones and Eliza Jones, all of said children being minors at the time of his death. On the — day of October, 1849, the said Nancy Jones intermarried with one James Priddy. On the ninth day of October, 1852, Nancy Priddy and her husband James Priddy, executed and delivered to one Lott Coffman, a deed which was acknowledged before a justice of the peace in Jackson county, purporting to convey Mrs. Priddy's one-ninth interest in the lands of ³²⁶ which Thomas Jones died seised, except forty acres thereof which had before that time been sold. By proceeding begun on the eleventh day of February, 1852, by said James W. Jones, as plaintiff, against the said Martha Jones and her other eight children the estate of the said Thomas Jones was partitioned. In the petition wherein it was alleged that said Nancy and Elizabeth Jones were minors. In the same proceeding and on the nineteenth day of March, 1852, the record recites that ‘On motion of plaintiff court appoints John W. Reid guardian ad litem for infant defendants and said guardian files answer. James Priddy, Nancy Priddy and Martha Jones and Mary Jones, failing to answer, the court orders that the petition be taken

against them as confessed.' In that suit certain lands, including the lands in question in this suit, were set off to Martha Jones as her dower.

"On or about the fifth day of May, 1853, said Nancy Priddy and James Priddy, her husband, and Elizabeth Jones, executed a joint deed to said Lott Coffman which conveyed to said Coffman their undivided two-ninths interest in the dower lands above referred to, subject to said dower. The validity and sufficiency of this deed, which is recorded in Book U at page 133 in the office of the recorder of deeds of Jackson county, Missouri, is now in question.

"Nancy Priddy on the fifth day of May, 1853, the date of the deed to Lott Coffman, was twenty-one years of age. In May, 1853, James Priddy and wife, Nancy Priddy and Elizabeth Jones, left Missouri and went to California. Elizabeth Jones on the 1st day of June, 1855, married one William Linvill at which date she was more than twenty-two years of age. Neither the said James Priddy or his wife Nancy, nor said Elizabeth Linvill, ever returned to Missouri. Mr. and Mrs. Priddy lived in lawful wedlock as husband and wife from 1849 to April 10, 1892, when she died. He died ³²⁷ in July, 1896. Mrs. and Mr. Linvill lived in lawful wedlock as man and wife from June, 1855, until about the second day of November, 1892, at which time the said Elizabeth died in the state of ——. Her husband, William Linvill, is still living and resides in Jackson county, Missouri. The said Nancy Priddy left surviving her, her husband, James Priddy, a son, George W. Priddy, and the following named grandchildren: Bertha M., Nora A., and George M. Rowland; James J., Nancy and Lillie Dugan; Floyd G., Albert and Ray R. Helm. The said Elizabeth Linvill left surviving her her husband, William Linvill, and four children: W. B., T. J. and Martha Linvill, and Jennie McCulloch, as her only heirs. The said Martha Jones held possession of said dower lands until the — day of —, 1868, when she sold and conveyed her interest in the same to said Lott Coffman. Said Martha died in the year 1869. The defendant was in possession of the land in controversy in this suit at the time this suit was commenced and said defendant, and those from and under whom he claims, have been in open, notorious, adverse and continuous possession of said lands for more than thirty-one consecutive years prior to the commencement of this suit. The plaintiff and those from and under whom they claim have not been in pos-

session of said lands for more than thirty-one consecutive years prior to the commencement of this suit; and neither the plaintiffs nor anyone from or under whom plaintiffs claim, have paid any taxes on said land during all that period. In the spring of 1895, a monument was erected by direction of James Priddy and his son, George W., at the grave of Mrs. Nancy Priddy. At the time it was erected it bore an inscription showing that she was sixty-six years of age at the time of her death. After said monument was erected the last of the two figures was altered for the purpose of making it appear from said inscription that Mrs. Priddy was sixty years of age instead ³²⁸ of sixty-six years of age at the date of her death. August 31, 1887, said James Priddy and wife, Nancy, William Linvill and wife, Elizabeth, executed powers of attorney to S. P. Forsee, authorizing him as their attorney to sue for, recover, take and receive possession of their respective interests in the lands of which Thomas Jones died seised; said power of attorney from Priddy and wife to said Forsee having been filed for record and recorded in the office of said recorder of deeds in Jackson county, Missouri, on the — day of —, 188—, in book —, at page —. Afterward, in 1888, the said William Linvill came to Missouri, visited his said attorney and certain members of the Jones family and from Benjamin Jones obtained the Jones family Bible. At the time said Bible was delivered to said Linvill, it contained a family record showing the dates respectively of the birth of said Nancy Priddy and said Elizabeth Linvill; said family Bible was then taken by said Linvill to his home in the state of Oregon; and said family Bible when offered in evidence in this case was in a mutilated condition and contained no trace of the record of the date of the birth of either said Nancy Priddy or Elizabeth Linvill; it contained only a statement that said Eliza Jones was born July 14, 1844. Eliza Jones was in fact born prior to October 14, 1843. As early as 1855, the said Nancy Priddy and Elizabeth Linvill, in California, stated to W. P. Linvill, husband of Elizabeth Linvill, that they would get the land in question back in some way, some time, if they could; and frequently thereafter spoke of making an effort to recover said land; and as early as 1875, said W. P. Linvill, husband of Elizabeth Linvill, consulted an attorney in the state of Oregon concerning their claim to the property in question; and during the whole of this time said Nancy and Elizabeth were claiming that they had an inter-

est in the property on the ground that they were minors at the time they executed ³²⁹ the deed of May 5, 1853, recorded in said Book U, at page 133. At the time of the execution of said deed, and thereafter, on the first day of June, 1855, said land was used for farming purposes only, and was not worth more than ten dollars per acre, and Kansas City was a small and unimportant town. At the time this suit was begun the said fifty-two acres of land was covered or partly covered by homes, splendid buildings and improvements estimated to be worth more than a million dollars, for several years has been within the limits of Kansas City, which increased in population to numbers of —, and the fact that said land had been taken into the city was known to Priddy and Linvill as early as 1868 or 1870."

Plaintiffs filed exceptions to both the finding of facts and the court's conclusions of law.

Judgment was for defendant upon both counts of plaintiffs' petition, and for defendant in accordance with the prayer of his cross-bill.

Motions for new trial and in arrest of judgment were filed and by the court overruled, after which the cause was duly appealed to this court.

The above, abbreviated as much as could be done, is a fair statement of the case, except the numerous errors assigned throughout the trial upon the merits, which will be taken up in the course of the opinion.

1. The first contention of plaintiffs is their failure to get a change of venue from Jackson county.

If ever parties made a strenuous effort to get out of the county it was made in this case. Upon this subject the applications and motions, with the evidence thereon, cover sixty-eight printed pages of record. As fast as new judges were qualified after the election in 1902, prejudice was discovered to be lurking in their minds. If an attorney happened to be sitting in the place of a sick judge, prejudice, by some X-Ray process, was discovered in his mind. It was first discovered ³³⁰ on November 4, 1902, as to Judges Gibson, Slover, Gates, Henry and Teasdale. After the election it was discovered as to Judges Gibson, Slover, Teasdale, Douglas and Evans, and as to Honorable F. C. Farr, sitting for Judge Henry from November to January. Such wholesale prejudice in the minds of honorable gentlemen sitting upon the bench was never before discovered. If so, the case has escaped our reading.

This strenuous effort upon part of plaintiffs was made before the opinions of this court in the cases of Eudaley v. Kansas City etc. Ry., 186 Mo. 399, and Guy v. Kansas City etc. Ry., 197 Mo. 174, for otherwise the volume of alleged facts found in this record, by the way of affidavits, would have remained in the minds of the parties rather than found expression as they did. Whether such conditions are the fault of the parties or the fault of the statutes concerning changes of venue, it is none the less lamentable. That out of eight men occupying positions on the bench, not one could be found with an unbiased mind toward parties litigant is certainly remarkable. And doubtless, though not apparent in the record, these judges were not even blessed with the acquaintance of the parties. But enough on this question.

Now, going back to the question of change of venue. The first application to Judge Gibson included all the judges of the court, unless it could be said that Judge Evans, before his qualification, which was on November 29th, was a judge thereof, because of the vote taken November 4th. On this application, no evidence was introduced in the presence of Judge Gibson tending to show prejudice upon the part of the other judges, and no reason assigned or shown except as found in the affidavit. When this application was being heard, in the colloquy between the court and counsel, Judge Gibson said, "I will hear any evidence you want to offer," to which counsel replied, "There is no use to offer testimony, ³³¹ your Honor will not consider it." This is a sample of what occurred. The order granting this change of venue and sending the case to division five was then and there made. This order transferred the case and Judge Gibson's right to act further therein was at an end, and this renders unnecessary the consideration of other matters forced, by tenacity of counsel, upon Judge Gibson on December 6th. Judge Gibson lost jurisdiction November 29th, and any steps taken thereafter in his court were of no effect. Under the rulings in the Eudaley and Guy cases, the sending of this case to division five was proper. The question is fully discussed in those cases, and we see no reason for departing from the views therein expressed, but, on the other hand, reannounce our adherence thereto, with the hope that it will at least have the effect of curtailing the number of applications and affidavits in such cases in the future. Those cases likewise dispose of the motion to remand and later application for change

of venue filed in division number five. One change of venue has been legally granted and the same parties were not entitled to another. Plaintiffs' first contention is therefore ruled against them.

2. The appeal in this case was taken by filing a certified copy of the judgment and order granting the appeal, instead of a full transcript. In other words, it is here by "the short method." Plaintiffs, now appellants, have filed an abstract of record. In this, so far as it relates to the testimony in the case, we find the oral testimony largely given in the narrative form. This rule is proper under our rule No. 13, except under certain contingencies in the rule mentioned.

One point made in the brief of plaintiffs reads thus: "The court erred in excluding competent evidence offered by appellants: (a) The declarations of members of the Jones family concerning ages and seniority of the Jones children were admissible upon proof ³³² (1) of the fact that the declarant was a member of the Jones family by blood or marriage, and (2) that such declarant was dead."

We have read and reread this abstract of record, and especially volume 2 thereof, which contains the evidence. Nowhere do we find in this abstract where plaintiff offered any evidence which was by the court excluded. In this abstract plaintiffs' evidence in chief begins on page 1 and ends on page 151, where it is said: "At this point plaintiffs rest their case." Defendant's evidence begins on page 151 and runs to page 329, where it is said: "At this point defendant rested." The plaintiffs then offered in rebuttal the deposition of Mrs. V. C. Hinkle, the abstract of which extends from page 329 to page 335, then follows some testimony for defendant, and as we take it some additional for plaintiffs. There are 348 pages in all.

If testimony was offered and excluded by the court, the abstract of the evidence should so preserve it and present it that this court can say whether or not the trial court was in error. From the abstract it would appear that even the class of testimony claimed to have been excluded was admitted. At any rate, the abstract nowhere points out any specific testimony which was offered and excluded, and shows no exceptions to the action of the trial court in so doing. What the original bill of exceptions may show we do not know, for that is not here. Upon this point the abstract is wholly insufficient under our rule. Matters of this kind must appear in the

abstract, not in the brief, except in the discussion of the point made and saved in the record. The only information we have of this alleged error is what we find in the brief under point 4, as hereinabove quoted. We have searched the record as abstracted to see what the evidence offered and excluded really was, but failed to find it. Under such circumstances we have nothing to consider and pass ³³³ upon so far as the alleged error in refusing to admit testimony is concerned. This point will therefore have to be ruled against the plaintiffs.

3. During the course of the trial a number of certified copies of the United States census reports were admitted in evidence, offered by the defendant as bearing upon the age of Mrs. Priddy and Mrs. Linvill. In these the abstract of record before us shows that objections were made by plaintiffs, and exceptions saved as to the ruling of the court thereon, and we thus have here a matter for our determination. The first offered was that of the census of 1890, which showed the age of Mrs. Priddy to be 64 years and the age of Mrs. Linvill to be 56 years. The enumeration was made June 14, 1890. To the instrument is appended the following certificate:

“UNITED STATES OF AMERICA,

“DEPARTMENT OF THE INTERIOR.

“Washington, D. C., June 14, 1902.

“Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed pages are true copies of the original schedules showing the members of the families of William P. Linvill and James J. Priddy of the county of Jackson, State of Oregon, as enumerated in the month of June, 1890, the same forming a part of the records of the Eleventh Census, of which the Secretary of the Interior is the custodian.

“In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

“(Seal)

E. A. HITCHCOCK,

“Secretary of the Interior.

“EMcD.”

To each of the other copies offered was a similar certificate. These records go back as far as the census ³³⁴ of 1830, when Thomas Jones, the father, lived in Rush county, Indiana. Were these copies so certified properly admitted in evidence? We think so. These are public official records, required by law to be made and kept, by sworn public officials of the law,

and by law required to contain the name, age, sex, color, occupation, etc., of each inhabitant. The identical question came up in the case of *Flora v. Anderson*, 75 Fed. 217. In that case, Sage, J., said:

“The defendants offered in evidence abstracts of the United States census official returns as to the families of James W. Flora, the foster-father of complainant, and John W. Flora, the complainant, duly certified from the department of the interior for the several censuses from 1820 to 1890, both inclusive. It appears from the evidence of the complainant himself as a witness in this case that there was not in Campbell county, Kentucky, at any time, any other family by the name of Flora, of which he had heard; nor was there any person in that county bearing that surname, other than his foster-father and mother and his own immediate family, excepting Robert Flora, brother of his foster-father. Robert lived with the complainant some little time after complainant's foster-father's death. These census returns show that the age of John W. Flora, complainant, was always computed as if he had been born in the year 1820. That such documents, being official registers, are admissible in evidence in so far as they contain statements as to matters which the law requires should be inquired into, reported upon, and then recorded, see 1 Greenleaf on Evidence, section 483, and Stephen's Digest Evidence, article 34.

“The statutes under which these census returns were compiled are as follows: For the fourth census—that of 1820—act of March 14, 1820 (Stats. 548); for the fifth census—that of 1830—act of March 23, 1830 (4 Stats. 383); for the sixth census—that of 1840—³³⁵ act of March 3, 1839, and act of February 26, 1840 (5 Stats. 331, 368); for the seventh and eighth censuses—those of 1850 and 1869—act of May 23, 1850, and act of August 30, 1850 (9 Stat. 428, 445); for the ninth census—that of 1870—the act the same as for the census of 1860, and in addition act of May 6, 1870 (16 Stat. 118); for the tenth census—that of 1880—act of March 3, 1879 (20 Stat. 475); for the eleventh census—that of 1890—act of March 1, 1889 (25 Stat. 760); and acts February 22, 1890, and August 14, 1890 (26 Stat. 13, 313). Examination of these statutes will show that as to each census the enumerator was required by the law itself, and not merely by the direction of his superior officers, to investigate the record and particular matters which are shown in the abstract for that

census; and that this investigation was to be made, where practicable, by inquiry from the head of the household in question. These records, therefore, are not simple public records, made for the express purpose of ascertaining and preserving proof of the facts there contained, but are records made by an officer under his official oath of declarations as to matters of pedigree, by persons whose declarations are competent proof upon that subject."

Also, in the case of *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306, admissibility of a record kept by the United States Signal Service Station at Chicago was questioned. Justice Strong said: "It may be admitted there is no statute expressly authorizing the admission of such a record, as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, What is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes ³³⁶ require meteorological observations to be taken at the military stations in the interior of the continent and at other points in the states and territories for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence 'official registers of records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation': Taylor on Evidence, sec. 1429; 1 Greenleaf on Evidence, sec. 483. To entitle them to admission it

is not necessary that a statute require them to be kept. It is sufficient that they are kept in the discharge of a public duty: 1 Greenleaf on Evidence, sec. 496. Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him: *Galt v. Galloway*, 4 Pet. 332, 7 L. ed. 876. It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned: *DeArmond v. Neasmith*, 32 Mich. 231; *Gurney v. Howe*, 9 Gray (Mass.), 404, 69 Am. Dec. 299; *The Catherina Maria*, L. R. 1 Ad. & E. 53; *Cliquot's Champagne*, ³³⁷ 3 Wall. 114, 18 L. ed. 116. We think, therefore, that there was no error in admitting the record kept by the person employed for the purpose by the United States Signal Service."

To the same effect is *Chicago & N. W. R. R. Co. v. Traves*, 17 Ill. App. 136. Nor are we without authority in Missouri upon this question. In *Weber v. Collins*, 139 Mo. 501, 41 S. W. 249, speaking in reference to the records kept at the United States Signal Service Station at St. Louis, this court said: "We are of opinion that the records themselves would have been admissible as evidence of the character of the weather. The record is required to be kept by the laws of the United States. They are official, and a statute of the state provides that 'all records . . . kept in any public office of the United States . . . not appertaining to a court shall be evidence in this state': Rev. Stats. 1889, sec. 4844."

In *Moore v. H. Gaus & Sons Mfg. Co.*, 113 Mo. 98, 20 S. W. 975, where a sworn copy of such records was used, we said: "This court will take 'ex officio' cognizance of the fact that the Signal Service is a department of the government of the United States and the register of the weather kept by its officers is a public record. 'Where the proof is by a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible': 1 Greenleaf on Evidence, sec. 485; Wharton on Evidence, sec. 639. The fact that a certified copy of the record itself might have been admitted in no wise destroys the common-law rule."

Both as to the method of proof and competency, the California court, in *People v. Williams*, 64 Cal. 87, 27 Pac. 939, has said: "It is contended that the court erred in admitting in evidence the certificate of the superintendent above mentioned. We do not think so. The records of this census were under the care and in the custody of that officer, and on

common-law principle, as the ³³⁸ record could not be taken from his custody, a copy of such census, or any part of it, could be proved by a copy certified by him."

In the very recent case of *Levels v. St. Louis & H. R. R. Co.*, 196 Mo. 606, 94 S. W. 275, Valliant, J., speaking for this court, said: "A register as required by that statute was kept by the teacher of the school which Hattie attended for the term beginning September 4, 1899, and that register shows that her first day's attendance was November 6, 1899, and her age was then seventeen years. Defendant offered that register in evidence and it was excluded on objection of plaintiffs. The court erred in excluding the evidence; the register was a record which the law required to be kept, and the evidence showed that it was kept in strict conformity to the requirement of the law. It was not record evidence in the strict sense of conclusiveness, but like the school enumeration lists and the United States census lists, it was competent evidence to be weighed in the balance with other evidence: *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *Van Riper v. Morton*, 61 Mo. App. 440; *Reynolds v. Prudential Ins. Co.*, 88 Mo. App. 679; *Ohmeyer v. Woodmen Circle*, 91 Mo. App. 189, 201; 1 *Greenleaf on Evidence*, 16th ed., sec. 483; 9 *Am. & Eng. Ency. of Law*, 2d ed., 883."

In the *Levels* case the defendant had offered the enumeration lists, and had also offered, as in the case at bar, a certified copy of the United States census schedules or lists, all bearing upon the question of age. The trial court had admitted the enumeration lists and the certified copy of the census lists, but had excluded the school register offered.

We have examined with care the numerous cases cited by plaintiffs. The nearest in point is the case of *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. Rep. 779, 38 L. ed. 653. The question was as to the age of a half-breed Indian, George Washington by name. Under instructions, an agent of the office of Indian Affairs had taken a census of persons of ³³⁹ Indian blood, entitled to an allotment of lands under the treaty of Prairie du Chein. In taking this list or census, under instructions from his department, the agent took not only the name, but the age and sex. In this case the court holds the record incompetent on the question of age, but uses this significant language: "But neither the treaty, the act of Congress, nor the instructions of the department contemplated any special inquiry into the ages of the Indians. It is true

that, in the letter of instructions, the agent was directed to report as well the age as the sex and tribal relations of the claimants. But this was merely to enable the agent, when he came to allot the lands, to identify the persons entitled to participate."

It will be seen that the court puts it upon the ground that there was no law, either by treaty or statute, requiring such a record to be compiled and kept. Not so with the census laws. These laws require the public officer to gather and record this information, just as our state law requires the school teacher to ascertain and record the name, age and sex of his pupils.

We have no hesitancy in saying that these census lists or schedules were competent evidence, to be weighed by the court for what they are worth, and that the copies were properly certified, although the last proposition is hardly questioned by plaintiff.

4. It is urged that the conclusion reached in this case ignores the holdings in the case of *Linville v. Greer*, 165 Mo. 380, 65 S. W. 579. It is true that in that case a part of this same dower land of Martha Jones was in dispute and that the same deed was in dispute, as in this case. However, the *Linville-Greer* case was tried upon the sole theory that there was a bar to the action by the statute of limitations. We have gotten the old record in that case and find this statement from defendant's counsel in that record:

"By Mr. Smith, attorney for defendants: All the ³⁴⁰ evidence I have to offer is: That the legal title as well as the equitable title emanated from the United States government more than ten years before the filing of this petition, and the evidence as shown by the agreed statement of facts."

There was no evidence of the age of Mrs. Priddy and Mrs. Linville at the time of the execution of the deed, except such as was introduced by the plaintiff. In fact, the whole case was tried upon the theory of the statute of limitations being a bar to the action. Here the case is different. Here we have volumes of evidence upon the question of age, and the census reports from 1840 up to 1890, showing rather conclusively a different state of facts as to the ages of these two women at the execution of the deed. • The facts are so different that as to that proposition, the matter of age, we are in no way bound by the *Linville-Greer* case.

5. The admissibility of evidence: 1. It is further contended that the casts and photographs of the Priddy monument were inadmissible. What was said under point 2 of this opinion is equally applicable here. We do not find in the abstract any objection to the introduction of these exhibits, nor any exceptions to the action of the court in admitting them. On the other hand, as to the casts of the monument, we do find this in the abstract, at page 192: "The defendants here offer Exhibit 'H,' marked by the stenographer 'Exhibit 53.' It was agreed that this exhibit might be taken to the supreme court and used by either party at the hearing."

And as to the photographs, we find, page 176 of abstract, this language: "Next: Defendant's attorneys offered the negatives accompanying said deposition, marked from 37 to 42 inclusive, also photographs marked from 43 to 48 inclusive. It is agreed that either party might use these exhibits in the supreme court."

³⁴¹ So that in the record there nowhere appears an exception to the introduction of these things, but, on the other hand, an agreement that they might be used in this court, and they were used in this court.

2. It is further urged in brief of counsel for plaintiffs that, "The court erred in admitting statements and declarations made by persons not members of the family in question tending to show what the reputation in the community was concerning the age or seniority of the Jones children. Such reputation is only admissible (a) when testified to by members of the family, and (b) it must be confined to family reputation or tradition."

This evidence is not pointed out to us by any objection of counsel to the introduction thereof, nor by exception to the action of the court in admitting it, if it was admitted. The court must go to the abstract of record for the facts and not to briefs of counsel. If there was such error, it is not for review here. What we have said here applies to all objections as to the introduction of evidence, except the census lists previously discussed.

6. The latter part of the third paragraph of the judgment is assailed. This paragraph is as follows: "3. It is therefore ordered, adjudged and decreed upon the defendant's cross-petition that defendant is the owner of the following tract of land in Jackson county, Missouri, beginning at the northwest corner of Independence boulevard and Wabash avenue, thence

north 172.75 feet; thence west 143 feet; thence south 172.75 feet; thence east 143 feet to the place of beginning, located in Kansas City, Missouri; and being a part of the land assigned to Martha Jones as her dower as aforesaid.

“And it is further ordered, adjudged and decreed that the power of attorney executed by James J. Priddy to S. P. Forsee authorizing him to sue for the ³⁴² recovery of the possession of said land and to sell the same, be and the same is hereby set aside and held to be of no effect; and it is ordered, adjudged and decreed that the cloud upon the said title to said land of defendant caused by said power of attorney is removed, and it is further ordered, adjudged and decreed that the plaintiffs and each of them have no right, title or interest in and to said real estate so belonging as aforesaid to defendant.”

Plaintiffs claim that inasmuch as said power of attorney embraced other lands, it should not have been canceled. In this we think they are in error, and have misconstrued this judgment. This judgment simply means that said instrument is canceled and its cloud removed in so far as it affects the land in controversy. Reading the entire clause of the judgment, this is the reasonable construction to be given thereto, and said power of attorney remains valid as between the parties and as to other lands affected thereby.

7. The trial court found that Mrs. Priddy was of age when she made the deed to Coffman. It further appears from this finding that Elizabeth Jones was more than twenty-two years old when she married in 1855. So that as to Elizabeth Jones, even if she was slightly under twenty-one years, when she made the deed, she reached her majority before her marriage and should have disaffirmed the deed. At least the statute would begin to run as to her from the date she became of age, and her subsequent marriage would not protect her. One disability cannot be tacked to another to defeat the statute: *Cunningham v. Snow*, 82 Mo. 587; *Burdett v. May*, 100 Mo. 13, 12 S. W. 1056, and authorities cited.

So that the deed from these parties conveyed their interest to Coffman, through whom defendant claims title. This obviates the necessity of discussing the numerous questions raised as to the thirty-year statute of limitations.

³⁴³ Owing to the magnitude of the interests involved in this action, and as intimated in the record, of others dependent thereon, we have gone through this record thoroughly.

There are some things, the mutilation of the tombstone, and the absence of the family record once in the family Bible, that are, to say the least, suspicious.

Upon the whole, we conclude that the finding of facts by the court below is well supported by the evidence and the judgment entered thereon a proper one, and said judgment is affirmed.

All concur.

A Change of Venue is a wrong to the public, unless the interests of justice to the defendant require it, and the prejudice of the judge must clearly appear: *State v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251. As to the sufficiency of the affidavit for a change, see *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427.

The Evidence Admissible to Prove the Age of a person is considered in the note to *Grand Lodge v. Bartes*, 111 Am. St. Rep. 583.

When the Statute of Limitations once commences to run, subsequent disabilities will ordinarily not obstruct its course: *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783; *Williams v. Long*, 130 Cal. 58, 80 Am. St. Rep. 68.

YALL v. SNOW.

[201 Mo. 511, 100 S. W. 1.]

OWNER OF BUILDING, Duty of to Provide Fire-escapes.—At the common law, the owner of a building not particularly exposed to fire from the character of the work carried on in it was not bound to anticipate the probability of danger from fire, or that its occurrence would put in jeopardy the lives of his employes or tenants, and the law does not require, where the building was properly constructed for its intended use and purpose, the construction of fire-escapes, the ordinary means of escape by stairs, halls and doorways being deemed sufficient. (p. 784.)

LANDLORD AND TENANT—Fire-escapes, Duty of the Former to Provide.—Under a statute declaring that "the owner, proprietor, lessee or keeper of every hotel which is of the height of three or more stories shall provide such structure with a fire-escape," the owner, as well as the lessee, may be held liable for the death of a guest in a leased hotel due to the absence of such an escape. (p. 790.)

LANDLORD AND TENANT—Fire-escapes.—Failure to Allege that the Building was Built to be Occupied by a Hotel is not material where the complaint to recover for the death of a person claimed to be due to the absence of a fire-escape avers that the defendant leased the house as a hotel, and that it was conducted as a hotel by his tenants. (p. 790.)

LANDLORD AND TENANT.—The Liability of a Landlord for Injuries Due to the Absence of a Fire-escape on a Building Used

as a Hotel cannot be avoided by showing that it was leased before the statute required such fire-escape, and the landlord, therefore, had not a right of entry or control of the building to construct and provide such escape. (p. 790.)

Ernest E. Wood, for the appellant.

Collins & Chappell, for the respondents.

515 GANTT, J. This action was commenced in the circuit court of the city of St. Louis, on the seventh day of November, 1903. It is brought by the plaintiff, as the widow of Morris Yall, deceased, for damages accruing to her from the death of her husband by the burning of a certain three-story brick building in the city of St. Louis, located on the southwest corner of Olive and Beaumont streets, and numbered 2700 and 2702 Olive street.

The petition alleges in substance that Robert B. Snow, the defendant, was at all the times herein mentioned, and is at present, the owner of the above-described property, commonly called the Empire Hotel. That on the twenty-fifth day of July, 1899, the defendant and others, owners thereof, leased said property as a hotel, to William E. and Katharine Gillham for a term of ten years, commencing on the first day of September, 1899, and to be fully completed and ended on the twenty-first day of August, 1909, the said lessees and all claiming under them, by virtue of the provisions of this lease, yielding and paying a total rent therefor to the said lessors or their legal representatives of seventeen thousand five hundred and fifty dollars in monthly installments of one hundred dollars, payable on the first day of each month of every year during the said term, and further stipulations of the lease are as follows: **516** "That the said lessee will not suffer or commit any deterioration of the said premises, nor suffer any nuisance in, upon or adjacent thereto; nor will they assign this lease, or underlet the whole or any part of the premises embraced therein, nor will they make any change or alteration in the building, nor permit them to be used or occupied in any manner other than herein specified, without the assent thereto of the said lessors, their heirs or assigns in writing be first obtained; that the said lessee will quit and deliver up the possession of the said premises to the said lessors, their heirs or assigns, peaceably and quietly, when this lease shall terminate by the limitation of its terms, or by forfeiture, in as good order and condition in every respect as the same are

now or may hereafter be made by repairs, save only the wear thereof from reasonable and careful use and casualties from fire, not resulting from the design or negligence of the said lessees, their family, agents or servants. All the repairs deemed necessary by the lessees to be made at the expense of the lessees, with the consent of the lessors and not otherwise; the said lessors, their heirs or assigns shall at all reasonable times and hours have the right to enter upon and inspect the state and condition of said premises." The petition then proceeds to allege that at all times mentioned herein the defendant and others collected rent for said property from the said lessees; that the said property is three stories in height and at all times mentioned therein the said property was conducted as a hotel or lodging-house by the said Gillhams; that at all times mentioned herein said defendant knew that said property was being conducted as a hotel or lodging-house by the said lessees; that at all times mentioned herein it was the duty of the said defendant to provide the said hotel or lodging-house with fire-escapes, iron balconies and exterior iron stairs, as required by law. Plaintiff alleges that the said defendant, his duty as ⁵¹⁷ above alleged neglecting, failed to provide fire-escapes as required by law or at all, and further failed to provide iron balconies as required by law or at all, and failed to provide exterior iron stairs in case of fire, as required by law, or at all. And plaintiff further alleges that on the ninth day of February, 1902, while the said hotel was being operated, with the knowledge of said defendant, on account of the negligence of the said defendant, there was connected with said hotel no fire-escapes, no iron balconies and no exterior iron stairs as required by law, or at all. That on the ninth day of February, 1902, Morris Yall, the husband of this plaintiff, was a lodger of said Gillhams in the said hotel or lodging-house; that the said Morris Yall occupied a room above the second story of the said hotel or lodging-house, which said room so occupied had an outside window; that at about 3 o'clock A. M. on the ninth day of February, the said Morris Yall was aroused from his sleep on account of fire in the said building, and being aroused, he tried to escape from the building, but was unable to do so owing to the fact of there being no fire-escapes, no iron balconies and no exterior iron stairs in connection with said hotel; that the said Morris Yall, being unable to escape from the said burning building on account of their being con-

nected therewith no fire-escapes or iron balconies, came to his death within the burning building on account of being burned by fire. That if there had been fire-escapes, as required by law, connected with the said hotel, the said Morris Yall would have escaped thereby to the ground without injury to himself. That if there had been iron balconies connected with said hotel, as required by law, the said Morris Yall could have stood thereon and would have been rescued by firemen. That the death of said Morris Yall was due to the fact of there being no fire-escapes, no iron balconies and no exterior stairs connected with the said hotel or ⁵¹⁸ lodging-house. Plaintiff alleged that the death of the said Morris Yall was due to the neglect of the said defendant in not performing his duty as above alleged, and in not providing their said hotel or lodging-house with fire-escapes, iron balconies and exterior stairways. That plaintiff is the widow of the said Morris Yall; that the said Morris Yall was the only support of this plaintiff and her infant child, and that by the death of said Morris Yall, plaintiff has been damaged by the said defendants in the sum of five thousand dollars. Wherefore, she prays judgment against the defendant Robert E. Snow for five thousand dollars.

To this petition the defendant filed the following demurrer:

“Now, at this day, comes the defendant in the above-entitled cause, and demurs to plaintiff’s second amended petition, and for ground of this demurrer, defendant states:

“First. That said petition does not state facts sufficient to constitute a cause of action, in this, that while it appears from the allegations of said petition that the defendant, with others, were the owners of the real estate therein described and the buildings thereon erected, it does not appear that the defendant and his co-owners were conducting a hotel or lodging-house therein, and that there was therefore no duty resting upon the defendant under the law to provide or equip the said building with fire-escapes, iron balconies, or exterior iron stairs.

“Second. That said petition does not state facts sufficient to constitute a cause of action, in this, that while in said petition it is alleged that said defendant and others were the owners of real estate therein described and of the buildings thereon erected, it is not alleged that said buildings were built to be occupied or used as a hotel or as a lodging-house, and that there was therefore no duty resting upon the de-

fendant to ⁵¹⁹ provide or equip the said buildings with fire-escapes, iron balconies, or exterior iron stairs.

“Third. That said petition does not state facts sufficient to constitute a cause of action, in this, that it appears affirmatively from said petition that while said defendant and his co-owners of the real estate described therein and of the buildings thereon erected, it also appears that said buildings were erected and were leased by said defendant and his co-owners for a term of ten years prior to the passage of any law requiring any person to erect fire-escapes thereon, and that the said buildings were therefore, at the time of the passage of any law requiring the erection of fire-escapes, in the possession and sole control of the lessees under said lease.”

The circuit court sustained this demurrer, and the plaintiff declining to plead further final judgment was rendered in favor of the defendant and for costs. Thereafter, and during the same term, plaintiff filed his affidavit for an appeal to this court, which was allowed and granted.

At common law the owner of a building not particularly exposed to the danger of fire from the character of the work to be carried on in it, was not bound to anticipate the possibility of remote danger from fire, or that its occurrence would put in jeopardy the lives of his employés or tenants, and the law did not require, where the building was properly constructed for its intended use and purpose, the construction of fire-escapes—the ordinary means of escapes by stairs, halls, doorways and windows being deemed sufficient: *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90, 21 N. E. 999, 15 L. R. A. 194; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782.

This action is bottomed upon the act of the General Assembly of the state approved March 27, 1901, which has been held by this court in *Yall v. Gillham*, 187 Mo. ⁵²⁰ 393, 86 S. W. 125, to have superseded sections 9036 to 9045 of the Revised Statutes of 1899, inclusive. In sustaining the demurrer to the petition the learned circuit court evidently was of the opinion that under the act of 1901 the duty of providing outside fire-escapes was not imposed upon the owner of the building, but upon the person or persons who were in the possession and occupancy of the building at the time the act of 1901 took effect and became operative, and that inasmuch as the defendant owner had, on the 25th of July, 1899,

prior to the enactment of the said act, leased the premises to the Gillhams for a term of ten years from the 1st of September, 1899, and the said Gillhams were in possession thereof at the time of the fire which occasioned the death of plaintiff's husband, the defendant was not liable for the failure to provide said structure with fire-escapes attached to the exterior of the said building as required by the act of 1901. Since the fire out of which this action had arisen occurred, the General Assembly has amended the act of March 27, 1901, by changing sections 1, 2 and 3 of the said act (Laws 1903, p. 251), but the changes made in section 1, upon which this action is founded, have not changed the provisions of section 1 so as to affect the rights of the parties to this action.

The decisive question arising upon this record is, Was the circuit court right in holding that under the terms of this statute the owner of a leased building is not required to provide his building of the character described in the act with fire-escapes as provided by the act? Counsel for the defendant, in their argument and brief, have called our attention to a number of cases in other jurisdictions, notably that of the supreme court of Pennsylvania in *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201, and *Keely v. O'Conner*, 106 Pa. 321; *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839; but an examination of the statutes upon which those decisions are based will show such a material difference from the language employed ⁵²¹ in the act of 1901 of our own legislature, that those decisions afford us very little assistance in reaching a proper construction of the act before us. We are unable to adopt the construction put upon this act by the circuit court. The language of the statute is, "The owner, proprietor, lessee or keeper of every hotel, etc., in this state, which has a height of three or more stories shall provide said structure with fire-escapes," etc. The law places this obligation upon the "owner," and for the purpose of this case it is entirely immaterial that some other persons, to wit, the lessees, may also be liable. There are no such qualifying words appended to owners, proprietors, etc., as would justify us in holding that those words only mean the party lawfully in possession when the act took effect, or when the fire occurred. The command is plain and unambiguous, and is directed to "the owner," and the fact that it is also directed to "the lessee" or "the keeper" of the premises, in no wise excuses him from a failure to obey the statute. The statute is a most salutary one

and remedial in its character. Its object is to protect human life, and, as said by the supreme court of New York, in *McLaughlin v. Armfield*, 58 Hun, 376, 12 N. Y. Supp. 164: "No reason is perceived why the court should strain after so strict a construction of its language as to deprive it of all useful operation." The lawmakers have seen fit to impose this duty of providing fire-escapes upon hotel buildings and other structures mentioned in the statute for the benefit of the guests of such hotels, and the operatives therein employed, so that in case of fire they may have a way of escape. Not only does section No. 1 designate "the owner" as one of the persons whose duty it is to provide fire-escapes, but section 4 of the statute re-enforces his liability by providing: "All buildings hereafter erected in this state which shall come within the provisions of this law shall, upon or before their completion, be provided with ⁵²² fire-escapes of the kind and number and in the manner set forth in this law, and any violation of this section shall constitute a misdemeanor on the part of the owner of such building, punishable as provided in section 5." As to all buildings, then, erected after the passage of the act, it is obvious that the duty rested exclusively upon the owner himself.

Counsel for the defendant have favored us with an exhaustive brief as to the meaning of the word "owner," and as to the signification which should be attached to it in this statute in *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201, the court very aptly remarked: "A number of authorities were cited showing the construction which has been placed on the word 'owner' both by the legislature and the courts. But the meaning of the word depends in a great measure upon the subject matter to which it is applied, and as it is used in each of the instances cited in an entirely different connection, they throw scarcely a glimmer of light upon the question. The term 'owner' is undoubtedly broad enough to cover either view of the case." If the construction for which the defendant contends should be adopted, it would convict the General Assembly, in our opinion, of having used a number of useless words. If the word "owner" was intended to mean the owner of the business, or the person conducting the hotel at the time of the fire only, then it was entirely unnecessary to name the owner or proprietor. Of all the statutes to which our attention has been directed by the learned counsel on either side of this case, the act of the legislature of Illinois,

approved June 29, 1885, entitled "An Act relating to fire-escapes for buildings," approaches more nearly to our act of 1901 than any we have examined. In the case of *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501, the language of the statute was, "The owner or owners, trustees, lessee, or occupants of any building," etc. And the same contention was made in that case as was made ⁵²³ in this, but the supreme court, through Mr. Justice Magruder, said: "Cases may be found, decided in other states, where it has been held that the word 'owner,' as used in statutes of this kind, means the person in possession of the premises destroyed by fire with the power of controlling the same. These cases place the responsibility upon the person in possession and occupancy of the property, and treat him as the owner for the time being, on the ground that the nature of his business renders the erection of fire-escapes necessary to protect the lives of his employés. In other words, the word 'owner' is there held to be the owner of the business conducted in the building, and not the owner of the building itself: *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201; *Keely v. O'Conner*, 106 Pa. 321; *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839. The construction thus contended for may have been proper, as applied to the statutes under consideration where such construction was adopted, but cannot be held to be the proper construction of the Illinois act of 1885. Section 2 of the latter act provides that 'all buildings of the number of stories and used for the purposes set forth in section 1 of this act, which shall be hereafter erected in this state, shall, upon or before their completion, each be provided with fire-escapes of the kind and number, and in the manner set forth in section 1 of this act.' The fact that the buildings are to be provided with fire-escapes 'upon or before their completion,' indicates that the duty of providing such fire-escapes devolves upon the owners of the buildings. The fire-escapes are required to be a part of the construction of the building itself. Moreover, the notice, commanding such fire-escapes to be placed upon the building, is required by section 3 to be given to 'the owners, trustees, lessee, or occupant, or either of them.' The injunction being in the alternative, the notice may be given to the one, as well as to the other, and, therefore, to the owner, as well as to the ⁵²⁴ lessee or occupant. We are, therefore, of the opinion that the appellees were not relieved from liability in regard to the placing of fire-escapes

upon their building, because the fourth floor of the premises, where appellant's intestate was at work at the time of his death, was in possession and under the control of tenants of appellees instead of being directly in the possession of appellees themselves." The structure of our act of 1901 is so similar in all material respects to that of the Illinois act of 1885, that the construction placed upon that act by the supreme court of Illinois applies as well to the act of 1901 as to the Illinois act, and we think it is a correct and proper construction of our act.

But if we are to invoke what might be termed the equities of the statute, while it unquestionably does place the obligation upon the lessee to provide the fire-escapes in case the landlord has failed to do so, we think the statute imposes the initial duty upon the owner, and rightfully so, because the whole scope of our act is to make the fire-escapes a part of the construction of the building itself, and it is unreasonable as between the landlord and the tenant to cast upon the tenant the burden of building an expensive addition to the house which was to become so attached to it as to become a part of it. A fire-escape of the character and dimensions required by the act in question is a permanent one, and, as said by McAdam in his work on Landlord and Tenant, third edition, volume 1, page 440: "It is not within the range of ordinary repairs which the tenant, in the absence of an agreement to the contrary, is required to make." In 2 Shearman and Redfield on Negligence, fifth edition, sections 702a, 1212, it is said: "In most of the states, if not all, the owners and lessees of certain classes of buildings, exceeding a specified number of stories in height, such as factories, hotels and tenement houses, are required to provide extra precautions for ⁵²⁵ the escape of the occupants in case of fire, by supplying ropes, outside ladders, doors or other appliances to that end. Under such an imposed obligation, the initial duty is on the owner." And, to the same effect is 2 Wood on Landlord and Tenant, second edition, section 381. The doctrine thus announced is peculiarly applicable to this case, because the landlord bound his lessee "not to make any change or alteration in the building," and the tenant might well have considered that a fire-escape of the character required by our statute would so change the appearance of the building as to constitute an alteration therein without the

consent of the lessor, and, as already said, as between them and the owner, the duty in the first instance devolved upon their landlord, whatever their obligation to their guests might be.

Our conclusion is that the learned circuit court erred in holding that the petition did not state a cause of action against the defendant as owner of the building, and that it was not necessary to charge the defendant to make the further allegation that he was conducting the hotel himself when the act of 1901 went into effect and when the fire occurred.

As to the second ground of the demurrer, that it was not alleged that the buildings were built to be occupied as a hotel, it is sufficient to say that it sufficiently appears from the petition, and the lease set forth therein, that the defendant leased the house "as a hotel," and that it was conducted as a hotel by the tenants, the Gillhams, and the defendant knew it was being so conducted.

The third ground of demurrer is that the defendant owner had, prior to the passage of the act of 1901, leased the premises for a term of ten years, and that at the time of the passage of the law requiring the erection of fire-escapes, the building was in the sole possession and control of the lessees, and that therefore ⁵²⁶ the defendant had no right of entry or control over the building to construct and provide the fire-escapes. We think there is little merit in this assignment in the demurrer. It would have been no violation of the lessees' rights for the defendant to have entered upon the premises and erected the fire-escapes which the law commanded both the owner and the tenant to erect. It would have been an act in obedience to a duty to society and the tenant's own guests and employes to protect them from injury by fire. This point is expressly ruled against the defendant in *White v. Thurber*, 55 Hun, 447, 8 N. Y. Supp. 661, in which it was held that, "Where a landlord, upon the requirement and after notice from the department of buildings of the city of Brooklyn, enters upon demised premises for the purpose of making repairs required by said department, it is not a breach of the covenant of quiet enjoyment contained in the lease thereof." No tenant would be heard in a court of justice to complain that his landlord had performed an act to make the leased premises safe for the occupants of the building, which act the law also required of the tenant himself.

It follows that the judgment of the circuit court must be and is reversed and the cause remanded for a new trial in accordance with the views herein expressed.

Burgess, P. J., and Fox, J., concur.

The Question of the Liability of the Owner of a Hotel for failure to provide means of escape from fire therein was considered in the case of Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 S. W. 428, which was an action brought against the defendant, as proprietor of a hotel, to recover for injuries sustained by the plaintiff while a guest therein for his inability to escape from fire, which escape would have been easy had compliance been made with the statute and ordinance controlling the subject. The plaintiff seems to have relied, first, upon a statute of the state enacted in 1899, and, second, upon ordinance of the municipality in which the hotel was situated. The statute relied upon made it the duty of every proprietor or keeper of a hotel or lodging-house over two stories in height to provide and securely fasten in every lodging-room above the second story which has an outside window, and is used for the accommodation of guests, or employes, a rope or rope-ladder for the escape of lodgers therein in case of fire, of at least one inch diameter, which shall be securely fastened within each room, as near a window as practicable, and of sufficient length to reach therefrom to the ground on the outside of such hotel or lodging-house, and made of strong material, and as secure against becoming inflamed as practicable; that in lieu of a rope or rope-ladder there might be substituted any other appliance that might be deemed of equal or greater utility by the fire department or other authority having control of fire regulations in the city or town where the hotel or lodging-house was situated. The court was of the opinion that this statute did not impose any duty upon or create any liability against the owner of the hotel when it was leased to or kept by another person, saying: "This is a duty imposed upon the keeper or proprietor—that is, the party conducting the hotel, whether he be owner or lessee—and not upon the owner of the property, unless he operates it." This conclusion was rested upon other provisions of the statute, to wit, a provision in section 2 requiring permanent iron balconies and stairs to be placed upon hotels of certain dimensions at the expense of the owner, and provisions of section 3, "requiring the proprietor or keeper of a hotel or lodging-house to call the attention of the guests to the rope and ladder there required to be provided. The owner of the hotel, where he is not personally conducting it, is not supposed to be present all the time, nor to know the guests in it, so as to give them this notice."

The ordinance of the city, however, declared that fire-escapes should be attached to all buildings where any story or stories above

the second story was or should be occupied as a hotel, tavern, factory or tenement house, and that any owner or agent failing to attach such fire-escape, upon notice of the city fire board, should be liable, upon conviction, to a penalty of five dollars per day for each day the omission continued. The court declared that the violation of this ordinance constituted actionable negligence, and that anyone coming within the protection of the law or intended to be benefited by it, suffering an injury peculiar to himself, the proximate cause of which was the nonperformance of the law, might maintain an action against the offender for the injury sustained. The provision respecting notice was held not to relieve the owner from liability where there was a failure to give him such notice, but merely to relieve him from the per diem penalty imposed by the ordinance.

The Duty of Owners of Buildings to Furnish Fire-escapes is discussed in *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357; *Weeks v. McNulty*, 101 Tenn. 495, 70 Am. St. Rep. 693; *Willey v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536. In *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201, under a statute providing that the "owners, superintendents or managers" of factories should provide fire-escapes therein, it was held that the tenant under a lease of a factory, not the landlord, was the "owner."

STATE v. OAKES.

[202 Mo. 86, 100 S. W. 434.]

CRIMINAL LAW—Former Acquittal—Plea in Bar.—If two counts in an indictment charge two separate and distinct offenses, resting on different essential elements, an acquittal on one count does not bar a prosecution for the offense charged in the other count, and a plea in bar, setting up the acquittal as to the one count, and alleging that the offense charged in the other count grew out of the same transaction as that contained in the count upon which the acquittal was had, and that the evidence to be given on the impending trial would be the same as that given on the first trial, presents a pure question of law, apparent upon the face of the record, and a demurrer to such plea is properly sustained. (p. 797.)

CRIMINAL LAW—Carnal Knowledge of Pupil by Teacher—Relation After School Hours.—The confidential relation of male teacher and female pupil exists as well after the pupil reaches home as it does in the schoolroom or during school hours, and the fact that sexual intercourse between them occurs at her home and after school hours does not exempt him from the penalty provided by statute for anyone who, to whose care, custody or protection, any female under the age of eighteen years shall have been confided, shall defile her by carnally knowing her while she remains in his care or custody. (p. 799.)

TRIAL—Instructions—Harmless Error.—Failure to instruct the jury on admissions or statements made by the accused to the effect

that what he said against himself should be taken as true, in relation to admissions contained in certain letters written by him, is not prejudicial to him and is harmless error. (p. 800.)

CRIMINAL LAW—Carnal Knowledge of Pupil by Teacher—Instructions.—If, on a prosecution under a statute making it a felony for any person to defile any female under eighteen years of age while she remains in his care or custody to which she has been confided, it appears that the accused was a school teacher, and that the prosecutrix was his pupil, that he visited her home nights when her mother was asleep or away from home, and then had sexual intercourse with her, it is proper to refuse to instruct the jury that if defendant's visits were made with the knowledge and consent of the mother, it terminated, for the time, the relation of teacher and pupil, and that the accused should be acquitted. (p. 801.)

TRIAL—Improper Remarks by Counsel—Correction by Court. If the trial court corrects counsel by telling him that remarks made by him in argument are clearly outside the record and improper, this is sufficient to prevent the arousing of prejudice in the minds of the jury against the defendant, and will prevent such remarks from working a reversal of the judgment. (p. 801.)

H. F. Prague and Foulke & Brown, for the appellant.

H. S. Handley, attorney general, and N. T. Gentry, assistant attorney general, for the state.

⁹⁴ FOX, P. J. This cause is here upon appeal by the defendant from a judgment of the Henry circuit court, convicting him, under the provisions of section 1845 of the Revised Statutes of 1899, of defiling his ward.

At the September term, 1905, of the circuit court of Henry county the grand jury returned an indictment against the defendant, embracing in such indictment three counts. The first count charged him, under ⁹⁵ the provisions of the statute, with having carnal knowledge of Opal Knaus, an unmarried female between the ages of fourteen and eighteen years, of previously chaste character; the second count charged the defendant with having carnal knowledge of Opal Knaus, a female under the age of eighteen years, who was then and there confided to his care and protection; the third count charged the defendant with taking one Opal Knaus, a female under the age of eighteen years, from her mother, for the purpose of concubinage. On December 19, 1905, being at an adjourned term of the Henry circuit court, the defendant was tried by a jury. On the 20th of December, 1905, during such trial, the prosecuting attorney dismissed the third count of said indictment. At such trial defendant was found guilty of the offense charged in the second count and was acquitted of the charge contained in the first count. Upon motion and

at the request of the defendant a new trial was granted him and he was again tried upon the charge embraced in the second count at the January term, 1906. It is this trial that is now before us for review.

Before the trial proceeded the defendant withdrew his plea of not guilty and filed his plea in bar of this prosecution. We deem it unnecessary to reproduce in full the allegations contained in this plea. It is sufficient to state that it is predicated upon the acquittal of the defendant of the charge in the first count. It fully and correctly sets forth the pleadings and record in connection with the trial in which a verdict of not guilty as to the first count was returned; makes allegation that the offense as charged in the second count grew out of the same transaction as that contained in the first count, of which defendant had been acquitted; that the defendant is the same person who was tried, and that the evidence offered wherein the defendant was acquitted was to the effect that Opal Knaus was fifteen years old, and that she was a pupil of defendant, who ⁹⁶ was then a school teacher, and that while said relations existed, he carnally knew her and had intercourse with her. That prior thereto she was of previous chaste character, and that the proof then made will be the same proof in this trial and none other; that this defendant stands ready to verify and prove all the facts and things alleged in his plea in bar. Then follows the prayer of the defendant in which he says that by reason of the terms and facts as stated in his plea in bar he stands fully acquitted of the alleged crimes, offenses or felonies charged in the first count, and he asks that he be permitted to prove and verify the same, and that he have a trial thereof to the end that he may be discharged from a further trial of the second count herein or any other count in said indictment. To this plea in bar the state filed first an answer, which upon motion of the defendant was stricken out. The state thereupon filed a demurrer to defendant's plea which, over the objections and exceptions of defendant, was sustained. Defendant thereupon refused to plead further, and the court ordered entered of record a plea of not guilty, and the trial proceeded.

At said trial the state's evidence substantially tended to show that the defendant was a school teacher by occupation, and that he taught one term and was principal of school in Urich, Henry county, Missouri. Prosecutrix lived with her widowed mother in the town of Urich, and attended the school

which defendant taught. This term of school opened in September, 1904, and continued till the following May, when defendant taught a summer school. Shortly after the opening of school, defendant began paying attentions to prosecutrix, who was then nearly fifteen years of age. Defendant would hand love verses to prosecutrix, read them to her and say that they applied to "our case." Defendant was a married man, but was not living with his wife. When prosecutrix would go up with her class to recite, defendant would always borrow ^{of} her book; and, in returning it, would press her hands close and fondle with them. Prosecutrix and defendant were together often during recess and noon hour, and defendant often talked to her on religious subjects. In January prosecutrix told defendant that they must stop being together so much, and he must stop paying her so much attention, as persons were beginning to talk about them. Defendant said nothing at that time, but late that afternoon defendant handed prosecutrix her book and indicated to her that there was a note in it for her. In this note defendant asked permission of prosecutrix to meet her at 11 o'clock that evening, and prosecutrix answered, saying for him to come to a certain door of her house. Defendant came, told her how much he cared for her and loved her, that his life would always be miserable unless she permitted him to go ahead with his attentions, that both of them were Christians, and that it was her Christian duty to permit him to visit her. No one was at home this night except prosecutrix and her grandmother, her mother having gone to a neighboring town. As the grandmother had gone to bed, no one knew of this visit to prosecutrix. Defendant further told prosecutrix that his wife cared nothing for him, that he cared nothing for her, as she was not a Christian woman, and was only a drawback to him. He further professed love for prosecutrix and said that he needed her to help him in his Christian life, and that he believed that he could help her a great deal. At the close of this visit, defendant asked prosecutrix if he could call again, and she consented that he might. Defendant called the next night, met prosecutrix, caressed her, and took improper liberties with her person. Defendant made a third visit the next night (her mother still being away) and this time had sexual intercourse with prosecutrix. Defendant and prosecutrix had various meetings after that, one on returning from prayer-meeting, others out in the yard, and still

others in the kitchen. At these various meetings defendant and prosecutrix had sexual intercourse—defendant talking to her continually about being in love with her, considering her his wife, and that there was nothing improper in them so indulging. Among other things, defendant told her that in the sight of man their actions would be wrong, but that in the sight of God it was all right. After it was definitely ascertained by them that prosecutrix was pregnant, defendant and prosecutrix ran off and went to California; they left Urich on July 12, 1905. A number of letters written by defendant to prosecutrix were offered in evidence; they tended strongly to corroborate the testimony of prosecutrix.

The defendant's evidence tended to prove that prior to the offense charged defendant enjoyed the reputation of being a man of good character. That most of the advancements at the school were made by prosecutrix, who brought defendant flowers; and that defendant never encouraged her any. The evidence for the defense further tended to prove that prosecutrix never allowed any other scholar to loan her or his book to defendant, but promptly handed him her book. The defendant did not testify in his own behalf, but offered certain records, in support of his theory of former jeopardy, which the court refused to admit in evidence.

At the close of the evidence the court fully and fairly presented the law in its instructions upon the facts as herein indicated. The defendant requested the court to give instructions numbered 1, 2, 3 and 4, which were refused by the court. Numbers 1 and 2 were in effect a demurrer to the evidence, requesting the court to direct the jury that under all the evidence, the record and indictment in the cause they should acquit the defendant. Number 3 in substance told the jury that if they found and believed from the evidence that the visits of the defendant to the house of Opal Knaus were had with the knowledge or consent of her mother, then such knowledge or consent terminated for the time the relationship of pupil and teacher, and they should acquit the defendant. Number 4 was simply a declaration of law that if the several acts of intercourse testified to by prosecutrix were had and committed after school hours and at the house of Opal Knaus' mother, then the jury should acquit the defendant.

The cause was submitted to the jury upon the evidence and instructions, and they returned a verdict finding the defend-

ant guilty as charged in the second count of the indictment, and assessed his punishment at two years in the penitentiary. Timely motions for new trial and in arrest of judgment were duly filed and by the court overruled. Sentence and judgment was entered in accordance with the verdict, and from this judgment the defendant prosecuted this appeal, and the record is now before us for consideration.

The principal complaints of error by the appellant, as disclosed by the record, may thus be briefly stated: 1. It is insisted that the court erred in sustaining a demurrer interposed by the state to the plea in bar. 2. It is claimed that the court erred in the admission of evidence as to the acts of sexual intercourse between the defendant and the prosecutrix after school hours, insisting that the relationship contemplated by the statute of teacher and pupil had been severed by reason of the school having closed for the day. 3. That the court erred in failing to instruct the jury fully upon all questions arising from the evidence and the record in the case. 4. That the court erred in refusing instruction numbered 3, requested by the appellant. ¹⁰⁰ This constituted the main errors as indicated in the brief of learned counsel, and we will treat of them in the order as herein indicated.

1. Upon the complaint of appellant as to the action of the court in sustaining the demurrer to his plea in bar, we are unable to agree with counsel upon this insistence, and it is sufficient to say upon this proposition that the law applicable to it was settled in the recent case of *State v. Laughlin*, 180 Mo. 342, 79 S. W. 401. We find no good reason for departing from the rules of law applicable to this subject, as announced in that case, and it must be taken as decisive of the proposition presented in the case at bar. There were three counts embraced in the indictment in this case, each of which constituted a separate and distinct offense, and the state having dismissed as to the third count and the jury having returned a verdict of not guilty as to the first count, it was purely a question of law apparent upon the record as to whether or not the acquittal of the defendant of the charge preferred in the first count or the dismissal by the state of the charge in the third count constituted a bar to the prosecution of the defendant for the offense charged in the second count. The action of the court in sustaining the demurrer interposed by the state to the plea in bar was manifestly proper. While it is true it was the same defendant, and the three counts were

doubtless embraced in the indictment to meet the phases of the testimony that might follow upon the trial, it is clear that the essential elements necessary to constitute the offenses charged in the three separate counts are by no means alike, and it is manifest that the defendant may have very appropriately been acquitted of the charge preferred either in the first or third counts, and still be guilty under the evidence of the commission of the offense charged in the second count.

¹⁰¹ It is most earnestly insisted that, as the plea in bar alleged that the same evidence was introduced in the trial wherein the defendant was acquitted of the first count as was introduced upon the trial of the cause for the second count, this presented an issue of fact, which should have been submitted and tried by a jury. The demurrer interposed by the state to the plea in bar necessarily concedes the truth of the allegations in such plea; therefore the allegations in the plea in bar that testimony was heard in the trial of the cause wherein the defendant was acquitted upon the charge preferred in the first count, showing the age of the prosecutrix and that she was a pupil of defendant then a school teacher, and that while such relation of teacher and pupil existed the defendant carnally knew her by having intercourse with her, must be taken as true, but conceding this, it by no means follows that the testimony had anything to do with the establishment of the essential elements of the offense charged in the first count. So far as the offense embraced in the first count is concerned, it was absolutely immaterial whether the defendant was a school teacher and the prosecutrix a pupil of his, or whether or not there was the relation of teacher and pupil existing at the time of the unlawful acts of sexual intercourse. The essential ingredients of the offense charged in the first count of the indictment, which was predicated upon section 1838 of the Revised Statutes of 1899, were simply that defendant was over the age of sixteen years and had carnal knowledge of prosecutrix, and that she was an unmarried female between the ages of fourteen and eighteen years of previously chaste character. Hence, it is apparent that there was no issue presented in the trial so far as the offense charged in the first count was concerned, as to the relation existing between the defendant and prosecutrix, and testimony of that character upon the trial of the offense charged in all three counts could have no application to the offense charged ¹⁰² in the first count, and doubtless was admitted simply as

applicable to the charge preferred in the second count. It is apparent, under the charges preferred in the three counts in the indictment, that, if it appeared in evidence that the prosecutrix was not a female of previously chaste character, the jury would be authorized to acquit the defendant of that charge; or, as to the third count dismissed by the state, it may be made to appear that the prosecutrix was not legally under the control of her mother, or it may be made to appear that the defendant did not take her away for the purpose of concubinage, or he may not have taken her away at all. Under this state of facts he would not be guilty of the offense charged in the third count; but under the charge as is embraced in the second count, if the relation existed between the defendant and the prosecutrix as contemplated by the provisions of section 1845, and while such relation existed he had sexual intercourse with the prosecutrix, then the offense as defined by that section is complete, and the essential elements as indicated, which are applicable to the offense charged in the first and third count, have no application whatever to the offense charged in the second count predicated upon section 1845. In our opinion the question presented by the plea in bar was purely and exclusively one of law, which was apparent upon the face of the record, and we repeat that the action of the court in sustaining the demurrer was manifestly proper.

2. It is next insisted that the acts of sexual intercourse as developed at the trial of this cause occurred subsequently to the closing of school for the day; that under that state of facts there was no such relation existing between the defendant and prosecutrix as is contemplated by the provisions of section 1845, and therefore the defendant was not guilty of the offense embraced in that section.

¹⁰³ This identical question was in judgment before this court in the recent case of *State v. Hesterly*, 182 Mo. 16, 103 Am. St. Rep. 634, 81 S. W. 624. The question was fully and ably presented by learned counsel; the opinion followed, prepared by the writer of the opinion in the case at bar, in which my colleagues, Judges Burgess and Gantt, both concurred. After due and appropriate consultation and reviewing the rules of law announced in the *Hesterly* case, we are unwilling to depart from the ruling in that case, and find no valid or legal reason for so doing, and the law as there stated must be taken as decisive of the question presented in the case at bar. After fully considering the provisions of the

statute creating the offense with which defendant is charged, and the purpose of the lawmakers in throwing around girl pupils of tender age, who might, by reason of the position, be susceptible of improper influences, such safeguards as would prevent the abuse of the confidential relation which should exist between teacher and pupil, we simply repeat what was said in the Hesterly case, that: "We are unwilling to sanction the contention of appellant which undertakes to limit the provisions of the statute to such a narrow field. In other words, we are unwilling to say that a teacher, who has in his charge girl pupils of tender age, so long as they are in the schoolroom or on their way home from school, are under his care and protection; but so soon as they reach the parental roof, his care and duty of protection of them is shaken off, and he is no longer subject to the penalties of the statute for defiling them. The confidential relation of teacher and pupil exists as well after the child reaches home as it does in the schoolroom; it exists on Sunday, as well as on a school day. The evil intended to be prevented is the abuse of the confidential relation, and that exists wherever they may be and on all occasions, as long as the relation of teacher and pupil is in existence."

¹⁰⁴ 3. Appellant complains that the court failed to fully declare the law upon all questions arising upon the evidence and the record in the cause. It is clearly indicated in the brief of learned counsel for appellant that this complaint is directed at the failure of the court to instruct the jury upon certain letters written by the defendant, which tended to show admissions on his part. In other words, the complaint is that the court failed to give the jury the ordinary and usual instruction upon the admissions or statements made by the defendant. We are unable to see how this failure in any way prejudiced the rights of the defendant or in any way endangered a fair and impartial trial. This instruction usually tells the jury that what the defendant said against himself should be taken as true, but what he said in his own behalf could be believed or not as the jury thought the same to be true or false. If anyone has a right to complain at the failure of the court to give this instruction, we are of the impression that it is the state and not the defendant. This failure in our opinion, did not constitute any reversible error.

4. It is earnestly contended by appellant that the court erred in refusing to give the jury instruction numbered 3 as

requested by defendant. This instruction in substance told the jury that if they found and believed from the evidence that the visits of the defendant to the house of Opal Knaus were had with the knowledge or consent of her mother, then such knowledge or consent terminated for the time the relationship of pupil and teacher, and they should acquit the defendant.

It is sufficient to say upon this proposition that the action of the court in refusing to give such instruction was manifestly proper. In the first place, there was no ¹⁰⁵ evidence upon which to predicate it; as the testimony in the cause plainly shows that defendant's visits at the times when the acts of sexual intercourse were had were made at night, when the mother was asleep, and others were made at nights when the mother was away from home, sitting up with the sick, and that other visits were made out in the yard, whither prosecutrix had gone, pretending to her mother that she had another excuse for going out. In the second place, the instruction does not properly declare the law. It was not within the power of the mother to consent to a violation of the law by defendant, and in our opinion, even if the mother had knowledge that defendant was having sexual intercourse with prosecutrix, it would in no way lessen the guilt of the defendant of the offense charged.

5. Appellant contends that the remarks of the prosecuting attorney and his assistant, Judge Lindsay, in their arguments to the jury were of such a character as would warrant the reversal of this judgment. We have read with care and consideration the remarks objected to by counsel for appellant, and while we do not wish to be understood as approving that line of argument, yet we are of the opinion that they are insufficient to authorize the reversal of this judgment. The court very plainly stated to counsel in the presence of the jury that the remarks were out of the record, and that his remarks were improper, and that in our judgment, so far as the remarks made in this cause were concerned, was sufficient to prevent the arousing of any prejudice in the minds of the jury by reason of such remarks. However, we will say now that it would have been much better if the trial court had more decisively insisted that counsel for the state should keep within the record, and enforce such power by appropriate methods as was in the power of the court to do.

We have carefully considered in detail the disclosures¹⁰⁶ of the entire record before us. The testimony introduced shows beyond question such a state of facts as fully warranted the jury in finding the defendant guilty. The court fully and fairly presented the law as applicable to the facts developed in this cause in substantial conformity to the announcement of the rules in the Hesterly case. The verdict of the jury in this case was clearly right, and to have found otherwise, under the facts developed in the cause, in our opinion, would have been a serious blow to the proper administration of justice by the courts of this state.

We have indicated our views upon the principal legal propositions disclosed by the record, which results in the conclusion, finding no reversible error, that the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

Identity of Offenses in a Plea of Former Jeopardy is the subject of a note to *People v. McDaniels*, 92 Am. St. Rep. 89.

The Relation of Teacher and Pupil falls within the class contemplated by a statute providing punishment for the offender, "if any guardian of a female child under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her while she remains in his care, custody or employment." And this relation continues to exist after school hours: *State v. Hesterly*, 182 Mo. 16, 103 Am. St. Rep. 634.

GORDON v. PARK.

[202 Mo. 236, 100 S. W. 621.]

EJECTMENT—Adverse Possession—Case for Jury.—If the answer in ejectment is a general denial and a plea of the statute of limitations, and there is some evidence tending to show that the defendants and those under whom they claim title have been in the adverse possession of the property for more than ten consecutive years before the commencement of the suit, the court properly refuses to take the case from the jury. (pp. 806, 807.)

ADVERSE POSSESSION of Mineral Rights.—If an owner of land conveys an undivided one-half interest in a coal mine, this operates as a severance, by grant, of the coal from the land overlying it, and, thereafter, the mere possession of the surface does not carry with it, or extend such possession to, the coal, and the grantee, as holder of the paper title to the coal sued for, is entitled to recover it, unless the defendant and those under whom he claims title have been in the actual, open, notorious, exclusive, adverse and hostile possession of the coal mine as such, independent of the

possession of the surface for more than ten years before the institution of the suit. (p. 807.)

ADVERSE POSSESSION of Mineral Rights.—Coal in place is land when severed by grant from the surface, and an action in ejectment therefor is barred in ten years only when the possession has been actual, adverse, open, hostile, exclusive and continuous. (p. 808.)

ADVERSE POSSESSION of Mineral Rights.—It is not necessary that the surface owner's adverse possession of a coal mine, severed by grant from the surface, be a bar to the owner's legal title, that work in the mine should have been done every day or within the view of the public for the requisite period of the statute of limitations; but it is necessary that such surface owner should have continued to exercise acts of possession and ownership over it, as by keeping off trespassers, giving permission to persons to take coal therefrom, paying taxes thereon, mining the coal when practicable or advantageous, or leasing the mine to others, from all of which the owner of the legal title must have known or inferred that the surface owner was claiming the coal as his own. (pp. 808, 809.)

APPEAL.—The Cause must be Heard upon Appeal upon the same theory upon which it was tried in the lower court. (p. 809.)

W. Gordon and E. W. Hinton, for the appellants.

N. T. Gentry, for the respondents.

241 **BURGESS, J.** This is an action in ejectment, instituted by plaintiff in the circuit court of Boone county, to recover possession of an undivided two-tenths of all the coal underlying certain land in said county owned by defendant Allen Park, which land and a coal mine thereon he had leased to defendant George Melloway. The petition is in the usual form. The defendants filed separate answers, that of defendant Melloway being simply a general denial; but defendant Park's answer, in addition to denying each and every allegation in the petition, set up and pleaded the statute of limitations.

The trial resulted in a verdict and judgment for the defendants, from which judgment plaintiffs appeal.

There is no dispute as to the ownership of the land, but only as to the coal underlying the same. Berkley Estes was the common source of title. It appears from the evidence that on February 25, 1859, he conveyed to Boyle Gordon an undivided half-interest in the coal mine in controversy, reciting in the deed that the other half had previously been conveyed to John B. Gordon. By deed, dated March 5, 1859, Boyle Gordon conveyed his undivided interest in the mine to George W. Gordon, the father of the plaintiffs. This deed was recorded in the recorder's office of Boone county March

7, 1859. George W. Gordon died in 1860, and by the terms of his will, which was probated July ²⁴² 24, 1860, all of his real and personal estate was given to his widow, Ann Eliza Gordon, during her lifetime, and at her death to her children, Irvin Gordon, Irene Gordon, Jennie Gordon, Webster Gordon and James Gordon, the two last named being the plaintiffs in this action. An inventory of all the real and personal estate of said George W. Gordon was made by the executors, Ann Eliza Gordon and James M. Gordon, but there was no mention in said inventory of any interest of the testator in said coal mine, nor was there any evidence that said George W. Gordon ever used or claimed any interest therein.

The land upon which the coal mine in question is situated was conveyed by Berkley Estes to his son in law, William A. Park, by deed executed June 1, 1868, which deed contained no reservation as to the said coal mine. William A. Park died on May 20, 1874, leaving a widow, a daughter and an infant son, the latter being Allen Park, defendant in this suit. By his last will and testament, William A. Park gave this land to his widow, during her lifetime, and to his children at her death. His widow died in 1875, and his daughter died intestate a few years later, never having married. Defendant Allen Park, being a child three years old at the time of his mother's death, was taken to the home of his uncle, William B. Estes. Mr. Estes qualified as executor of the estate of William A. Park, deceased, and also qualified as guardian and curator of defendant Allen Park, and acted as such guardian and curator until February, 1894. On December 27, 1893, defendant Allen Park became of age, having married a short time prior thereto, and moved to this land, living thereon till March 16, 1901, when he sold it to Sarah E. Hayes. Mrs. Hayes and her husband had this mine worked till they sold the place to defendant George Melloway, on February 2, 1903. The next day Melloway conveyed the land back to Allen Park. In neither ²⁴³ of the deeds of conveyance was there mention of any reservation as to the said coal mine. On the day of the last-named conveyance defendant Park executed a mining lease to said Melloway authorizing him to mine on said land.

It would appear from the evidence that the coal mine in question had been worked only at intervals. Shortly prior to the Civil War George W. Gordon, plaintiffs' father, and John B. Gordon, the owner of the other half-interest in the

coal, did some mining on the land, and no further work was done until after 1868, when William A. Park, the purchaser of the land, and one C. H. Gordon, a son of John B. Gordon, operated the mine for two or three years. After the death of William A. Park, no mining appears to have been done until 1878, when William B. Estes, defendant Allen's curator, rented the mine and collected some eight dollars royalty on the coal mined.

During the years 1889, 1890 and 1891 there was considerable mining done on the land, the royalty collected by curator Estes amounting to about fifty dollars each year. There was no evidence that any more mining was done until 1901, when the mines were worked by Hayes, and the work was then discontinued until about a year before the institution of this suit.

The evidence showed that the land on which the coal mine in question is situated was fenced in by William A. Park, and that the fence was maintained by curator Estes, by defendant Park and by Mrs. Hayes respectively; that during all the time William B. Estes acted as curator for defendant Park he claimed the coal mine as the property of his ward, and had the same worked at intervals, as stated. No demand was ever made by either one of the plaintiffs for possession of said coal mine, and no objection was ever made by either of them to the possession of same by the defendants until the filing of this suit.

²⁴⁴ At the close of the evidence the plaintiffs asked the court to instruct the jury that, under the pleadings and the evidence, their verdict must be for the plaintiffs for the possession of two-tenths of all the coal under the surface of the land described in plaintiffs' petition, which the court refused to do, and plaintiffs duly excepted.

The court, then, at the instance of plaintiffs, and over the objection and exception of defendants, instructed the jury as follows:

"1. The court instructs the jury as plaintiffs and defendant Allen Park claim title from and through Berkley Estes, deceased, to all the coal under the surface of the land described in plaintiffs' petition, it was sufficient for plaintiffs to show a derivative title from him to said coal, without proving his title further back.

"2. The court instructs the jury that plaintiffs have proved a perfect paper title to two-tenths of all the coal under the

surface of the land described in plaintiffs' petition, to wit, all that part of the east half of the southwest quarter of section 16, township 48, and range 12, in Boone county, Missouri, north of the Columbia and Cedar Creek Gravel Road, back to Berkley Estes, deceased, and your finding and verdict must be for the plaintiffs for the undivided two-tenths of said coal, unless the jury believe from the evidence that defendants, or one of them, had had such possession of said coal as is hereinafter explained in the instructions given for plaintiff.

"3. The court instructs the jury before they can find for the defendants, or either of them, on account of having possession of the said coal they must believe from the evidence that defendants, or one of them, or those under whom he or they claim title to said coal, has had the actual, exclusive, continued, peaceable and hostile possession of said coal for ten or more consecutive years prior to the institution of this suit.

245 "4. The court instructs the jury that the actual, exclusive, continued, peaceable and hostile possession of the surface of the land by the defendants, or either of them, described in the foregoing instructions, will not carry with it the possession of the coal under the surface of said land, and you should not find for the defendants, or either of them, on that account."

The court, at the request of defendants, and over the objection and exception of plaintiffs, gave the following instructions:

"1. If the jury believe from the evidence that the defendant Park and those under whom he claims ownership and title have been in the peaceable, open, notorious, adverse, continued and exclusive possession of the property here in controversy, claiming said property for more than ten years prior to the institution of this suit, the verdict and judgment must be for the defendants.

"2. If the jury believes from the evidence that the defendants, and those under whom they claim title, have been constantly in the open, notorious, adverse, exclusive and continued possession of the property described in the petition, for the period of ten years prior to the institution of this suit, and that the defendants and those under whom they claim title have continually claimed to be the owners of said land during said ten years, then the jury must find for the defendants."

The answer was a general denial and a plea of the statute of limitations, and there being some evidence tending to show

that the defendants, and those under whom they claim title to the coal had been in the adverse possession thereof for more than ten consecutive years before the commencement of the suit, the court, therefore, did not err in refusing to take the case from the jury: *Benton v. Klein*, 42 Mo. 97; *Owens v. Rector*, 44 Mo. 389.

When Berkley Estes, on the 26th of February, ²⁴⁶ 1859, conveyed an undivided one-half of the coal mine in question (having theretofore conveyed the other half to John B. Gordon), that operated as a severance, by grant, of the coal from the land overlying it, and, thereafter, the mere possession of the surface did not carry with it or extend such possession to the coal: *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 426; *Armstrong v. Caldwell*, 53 Pa. 284; *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144; *Williams v. Gibson*, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350; *Manning v. Kansas etc. Coal Co.*, 181 Mo. 359, 81 S. W. 140. So that, as the paper title to the coal sued for was in plaintiffs, they were entitled to recover, unless the defendants and those under whom they claim title had been in the actual, open, notorious, exclusive, adverse and hostile possession of the coal mine as such, independent of the possession of the surface, for more than ten years before the institution of this suit. "The surface owner setting up the statute must establish a possession of the mine, as such, independently of his possession of the surface. Such a possession must be actual, notorious, exclusive, continuous, peaceable, and hostile for the statutory period. And in these respects the surface owner is in no better position than a stranger. . . . Actual possession is taken by the opening of mines and carrying on of mining operations. That possession is continuous if the operations are continuous, or are carried on continuously at such seasons as the nature of the business and the customs of the country permit or require a cessation of operations in accordance with the custom of the neighborhood, or from necessity occasioned by some natural agency, would not be an interruption of the possession. But there must be something evidencing possession in the interval which connects the operations when resumed with those which have gone before, and to distinguish such possession from a series of repeated acts of trespass": *Barringer and Adams on the Law of Mines and Mining*, p. 569. In the same ²⁴⁷ work, on page 568; it is said: "In some states and territories special limitations have been imposed by statutes for

the recovery of mining property, but in the absence of such limitations such suits are governed by the general statutes relating to actions for the recovery of real estate": *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144.

In this state actions of this character are barred in ten years (Rev. Stats. 1899, sec. 4262), when the possession has been actual, adverse, open, hostile, exclusive and continuous; and, within the meaning of this statute, coal in place is land when severed by grant from the surface, as in this case. But in the case at bar the possession by defendants and those under whom they claim does not appear to have been continuous for the period of ten successive years at any one time. Some time between his purchase of the land, in 1868, and his death, in 1874, defendant's father, William A. Park, and C. H. Gordon, a son of the owner of a half-interest in the mine, operated it together for two or three years, after which it was not operated until 1878, when one Johnson, a tenant on the farm, got out a small quantity of coal, upon which he paid defendant Park's curator a royalty of about seven dollars. Then, after a lapse of several years, the mine was operated during the part of the years 1889, 1890 and 1891. So that, according to the evidence, there were several breaks in the continuity of possession, and at no time from the time William A. Park and C. H. Gordon began operating the mine, between 1868 and 1874, was there ten successive years of actual, adverse, open, hostile, exclusive and continuous possession of the mine by defendants and those under whom they claim, before the commencement of this suit: *Brown v. Hartford*, 173 Mo. 183, 73 S. W. 140. It is true, as claimed by defendants, that the evidence fails to show any claim or acts of ownership on the part of the plaintiffs to the coal; but they owned the legal title and could not have made it any stronger by exercising ²⁴⁸ ownership over the coal; and in order to divest them of their title by adverse possession, such possession must have been continuous and adverse for the requisite number of years. It was not necessary, however, in order to give defendants the benefit of the statute of limitations, that work in the mine should have been done every day, or that such work by defendants should have been done within view of the public. "All the authorities agree that the acts of possession must be visible and continuous for the requisite period in order to create the bar: *Sedgwick and Wait on Trial of Title to Land*, secs. 735, 737. It is not required that an act

of ownership should be done every day or month or at any definite intervals, but they should be of such frequency and character as would at all times apprise the owner 'that his seisin was interrupted and that his title may be endangered'": *Goltermann v. Schiermeyer*, 125 Mo. 291, 302, 28 S. W. 616. To prevent a break in the possession of those claiming possession of the mine, they should have continued to exercise acts of possession and ownership over it, as by keeping off trespassers, giving permission to persons to take coal therefrom, paying taxes thereon, mining the coal when practicable or advantageous, or leasing the mine to others, from all of which plaintiffs must have known or inferred that defendants were claiming the coal as their own.

Defendants' instructions are erroneous and misleading, in that they told the jury that the defense of adverse possession was sustained if the defendants had ten years' adverse possession of the property described in the petition, "and continually claimed to be the owners of said land," when the ownership or possession of the land was not in question.

Defendants contend that there was no proof that the widow of George W. Gordon was dead, or if dead, when she died, and that as she had a life estate in the ²⁴⁹ coal, the plaintiffs could not sue for possession thereof until after her death. But the case was tried upon the theory that Mrs. Gordon was dead at the time of the institution of the suit, and must be heard upon the same theory here: *Walker v. Owen*, 79 Mo. 563; *Benne v. Miller*, 149 Mo. 228, 50 S. W. 824; *Farrar v. Midland E. R. R. Co.*, 162 Mo. 469, 63 S. W. 115.

For the reasons indicated, the judgment is reversed and the cause remanded, to be tried in accordance with this opinion.

All concur.

The Title to a Mine *Which* has been Severed from the Surface may be acquired by adverse possession, but this can take place only when the possession is actual, continuous, open, notorious and hostile: *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 963.

If the Title to the Surface of Land has been Severed from the title to mineral underneath in place, possession of the surface for the statutory period of limitation does not convey title to the minerals: *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216; *Houser v. Christian*, 108 Ga. 469, 95 Am. St. Rep. 73.

CITY OF ST. LOUIS v. G. H. WRIGHT CONTRACTING COMPANY.

[202 Mo. 451, 101 S. W. 6.]

CONTRACTS for Benefit of Third Person—Right to Sue on.—A city, as the trustee of an express trust, cannot, unless especially authorized by its contract for the improvement of a street, maintain a suit for the use and benefit of abutting owners on the street, against the contractor and his bondsmen for damages to such property owners, caused by a breach of the contract. (p. 812.)

CONTRACTS for the Benefit of Third Persons—Parties—Right to Sue on.—If the third party is not named in a contract made by a city to improve a street for the use of such third party, the latter is the public, and not the abutting property owners, who are assessed to pay the cost of the improvement, and such a contract does not authorize the city to sue, for the use and benefit of such owners, for a breach thereof by the contractor. (p. 814.)

CONTRACTS for Benefit of Third Persons—Right to Sue When Third Parties Named.—If a bond given in connection with a contract made by a city for the improvement of a street provides that the contractor shall faithfully and properly perform the contract, and that the bond may be sued on at the instance of any materialman, laboring man or mechanic, in the name of the city, to his use, for any breach thereof, the city can sue for the use of such parties only as are named in the bond, and it has no power to sue for the use of the abutting owners on the street to be improved for a breach of such contract. (p. 817.)

CONTRACTS for Benefit of Third Persons—Power of City to Make.—A city has no intrinsic power to make a contract authorizing it to maintain a suit for the use and benefit of abutting property owners against a contractor and his bondsmen for a failure to perform a contract, made by the city for the improvement of the street. (p. 818.)

MUNICIPAL CORPORATIONS—Street Improvements—Intended Benefits.—Whatever benefit may accrue to abutting property owners as the result of a street improvement is purely an incident of the improvement, and not an object intentionally sought to be obtained by the contract made by the city for such improvement. The city owes no duty to the property owner to increase the value of his property, and if that is done, it is an incidental result of the contract. (p. 820.)

CONTRACT for Benefit of Third Persons—City as Agent for Property Owners.—Although a city in making a contract for street improvement is required to let it to the lowest bidder, this does not constitute it the agent of the abutting property owners, so as to entitle it to sue for their use for damages to them arising from a breach of the contract. (p. 820.)

CONTRACT for Benefit of Third Persons—Right to Recover.—Third persons to recover upon a contract entered into for their benefit must have either adopted the contract or complied with its provisions relating to them, or the debt or duty owing to such third party must have passed to or vested in the obligee of the contract before suit is brought. (pp. 820, 821.)

Seddon & Holland and F. C. Sharp, for the appellants.

C. W. Bates and B. H. Charles, for the respondent.

⁴⁵⁸ WOODSON, J. The city of St. Louis, as trustee of an express trust, instituted this suit in the circuit court of that city against respondents, based upon twelve distinct bonds, each declared upon in a separate count of the petition, and each involving questions identical in principle. We will, therefore, notice only one count, and what is said regarding that one will apply equally well to the other eleven. The facts of the case are substantially as follows:

The city of St. Louis on May 18, 1900, entered into a written contract with defendant, G. H. Wright Contracting Company, whereby the latter undertook to grade and pave some streets and alleys in said city, according to certain plans and specifications on file in the office of the board of public improvements, for a price therein stated, and to be paid for by special tax bills, to be issued by the city against the lots adjoining the improvements, as provided for in the city charter. The contract provided that if the contracting party abandoned the work or otherwise defaulted, the city should have the right to cancel the contract and relet the work.

The City Trust, Safe Deposit and Surety Company of Philadelphia executed the bond as surety and bound itself in a fixed penalty, conditioned that the contracting company should faithfully and properly perform the contract according to all the terms thereof, and should, as soon as the work was completed, pay to the proper parties all amounts due for materials and labor used and employed in the performance of the contract.

The language of the bond is as follows: "In the event the said G. H. Wright Contracting Company shall faithfully and properly perform the ⁴⁵⁹ foregoing contract according to all the terms thereof, and shall, as soon as the work contemplated by contract is completed, pay to the proper parties all amounts due for materials and labor used and employed in the performance thereof, then this obligation to be void, otherwise in full force and effect, and the same may be sued on at the instance of any materialman, laboring man or mechanic in the name of the city of St. Louis, to the use of such materialman, laboring man or mechanic for any breach of the condition thereof."

The contracting company refused to do any work whatever under the contract, whereupon the city relet the contract to J. E. Perkinson for the said improvements, at an advanced price of six thousand five hundred dollars. Perkinson made the improvements according to the second contract, and the city issued special tax bills against the adjoining lots and delivered them to him in full payment for said improvements. Each tax bill, of course, bore its proportional part of the six thousand five hundred dollars, the increased cost of the improvements.

The cause was referred to a referee, and he found for the city, and recommended a judgment against appellants for the said six thousand five hundred dollars. Upon the incoming of the report appellants filed exceptions thereto, which were overruled, and thereupon they filed their motion for a new trial and in arrest, both of which being overruled by the court, they duly appealed the cause to this court.

1. The questions involved in this case are, whether or not the city of St. Louis, under the contracts and bonds mentioned, is a trustee of an express trust, for the use and benefit of the property owners of the adjoining lots to the streets and alleys proposed to be improved by the city, and whether or not the city, by authority of and in pursuance of said contracts and bonds, can sue for and recover the damages they sustained ⁴⁶⁰ for their use and benefit, caused by breaches thereof.

Exhaustive research by court and counsel has failed to discover where these exact questions have ever been presented to any court in this state or elsewhere. The questions seem to be of first impression in this country, and will, on that account, have to be approached and disposed of upon principle, and not from precedent.

The general rule that third parties cannot maintain an action for damages resulting from a breach of contract by one of the parties thereto is well grounded in the jurisprudence of this state: *Roddy v. Missouri Pac. R. R. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. 1112, 12 L. R. A. 746, and cases cited.

The reason for this rule is apparent. There is no privity of contract nor contractual relations existing between the obligee of the contract and the third parties. As such obligee he is a stranger to the others and owes them no duty; and

in the absence of duty there can be no obligation: *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621.

As stated by this court, speaking through Judge Macfarlane, in the case of *Roddy v. Missouri Pac. R. R. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. 1112, 12 L. R. A. 746: "To hold that such actions could be maintained would not only lead to endless complications, in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume."

The above rule, like most other principles of law, has its well-founded limitations and exceptions; and one of those exceptions is, that a contract between two parties based upon a valid consideration may be enforced by third parties when entered into for their benefit, and that is true though such parties are not named in the contract nor are privy to the consideration.

It is sufficient, in order to create the necessary ⁴⁶¹ privity, that the obligee owe to the parties to be benefited some obligation or duty, legal or equitable, which would give them a just claim: *St. Louis v. Von Phul*, 133 Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 843; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198.

2. The city to maintain this suit proceeds upon the theory that the contract entered into between it and the appellants, whereby they obligate themselves to pave the streets and alleys mentioned, was based upon a valid consideration, and was made by it for the benefit of the adjoining property owners; that is to say, in contemplation of law, street improvements are beneficial to the adjoining lots which inures to the owners by virtue of their ownership. In other words, the city not only acts for itself in the matter of street improvements, but also as the legally constituted agent of the property owners, and in that respect the contract partakes of a dual nature—first, for the benefit of the public at large; and, second, for the benefit of the property owners.

There is a broad distinction between the principle involved where a contract is entered into between two parties for their own use and benefit, and where they make a similar contract for the benefit of a third party. A breach of the first would create no cause of action in favor of a third party, even though he was thereby deprived of large benefits which would have flown to him had the contract been performed;

while in the latter case the breach would create a cause of action in his favor, even though the benefits he would have received from its performance might have been insignificant as compared to those he was deprived of by the breach of the former. This proposition is fully supported by the authorities cited in paragraph 1 of this opinion.

From what has thus been stated, it can be seen that the character and value of the benefits and their loss or reception have no weight whatever in determining the question as to whether or not the contract was made ⁴⁶² for the benefit of third parties, who in this case are the property owners. So the primary question involved in all of this class of cases, where the third parties are not named or designated, is one of intention. And as this contract is in writing, that intention must be gathered from the writings. In order to do that we have the right to consider the character of the parties to the contract, and the facts and circumstances surrounding them at the time of its execution. With that rule of construction in mind, we find a municipality, with only statutory powers, exercising governmental functions, as a subdivision of the state, entering into a contract to improve its streets and highways. If we ask ourselves the question, for whose benefit was the contract made, the answer naturally comes back, for the use and benefit of the public, because the improvement of the street, which belongs to the public, was the object sought to be obtained. On no other principle would the city have the right to tax her citizens for such improvements. It is powerless to raise funds by taxation for the construction of private ways.

Having disposed of the public branch of the question, we now come to the consideration of the branch which it is contended was intended for the benefit of the property owners.

Under our form of government street improvements can be paid for in two ways—first, by general taxation, where the entire public pays the cost, in which case the property owners, as such, have no concern; and, second, by special taxation, where the cost of the improvements is assessed against the adjoining lots, and in the latter case the public is not interested. But in both cases the same result is reached by two different ways or means, both of which are equally beneficial to the traveling public, and the improvements, when completed, under either mode of taxation, are just as beneficial to the adjoining property as the other. That being true, we

are unable to see how the city is ⁴⁶³ acting for the individual property owners any more in the one case than the other. In both cases the contracts for construction are for the public good, and both are equally beneficial to the adjacent property owners, and it is equally as much the duty of the city to guard the interest of the public in making paving contracts to be paid for out of the public revenues as when the cost is to be assessed against the lots. Yet we do not suppose that it would be contended that each and every individual member of the public would have a cause of action against the contractor for a breach of his contract, which necessitated a re-letting of the improvements at a much higher price than that stipulated for in his contract. The principle involved in both cases is identically the same.

There is no express or implied authority to be found in the charter of the city of St. Louis to improve streets for the benefit of the adjoining lots, or for the benefit of their owners, because that would be exercising the taxing power of the city for private purposes, which is expressly prohibited by the constitution: Mo. Const. 1875, art. 10, sec. 3.

The tax is imposed for public purposes in the payment of street improvements, and not for private use. As an incident only to the public improvement the adjoining property is benefited, and because of that benefit the tax is assessed against the property and not against its owners. It is optional with them to accept or reject the benefits after the work is completed.

What we have here expressed is not in conflict with the views stated by this court in the case of *St. Louis v. Von Phul*, 133 Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 843. That case was a suit brought by a materialman against the contractor and his bondsmen for materials furnished in the improvements of a street in the city of St. Louis. The bond contained, among others, the following provision: "And shall, as soon as the work contemplated by ⁴⁶⁴ said contract is completed, pay to the proper parties all amounts due for material and labor used and employed in the performance thereof, then this obligation to be void; otherwise of full force and effect, and the same may be sued on at the instance of any materialman, laboring man, or mechanic, in the name of the city of St. Louis, to the use of such materialman, laboring man, or mechanic, for any breach of the condition hereof."

This court held that the plaintiff could recover in that case, because the bond expressly provided for the payment of all materials furnished the contractor; and distinguished that case, on account of that provision in the bond, from the case of *Kansas City v. O'Connell*, 99 Mo. 357, 12 S. W. 791.

The latter case was a suit against O'Connell and his bondsmen for personal injuries received by the alleged negligence of O'Connell while building a sewer. The bond in that case contained this provision: "It is further distinctly agreed that the said party of the first part shall be responsible for all unlawful damages to persons or property, from negligence, or carelessness, in doing said work, or in not using proper precaution in doing said work, and shall indemnify the city of Kansas against all losses or claim for damages, on account of such neglect, or carelessness, and to pay all laborers employed on said work."

In passing upon that case, this court said: "Aside from the covenants as to laborers, the object and purpose of the bond is to secure a performance of the work according to the terms of the contract, and to protect, and save harmless, the city from damages occasioned by the negligent acts of the contractor and his servants. In these respects, it is not an agreement with the city for the benefit of third persons, but for the protection and benefit of the city. . . . This bond must be construed as a whole, and when this is done, ⁴⁶⁵ aside from the covenant to pay laborers, it is simply one of indemnity to the city."

The same is true and may be said of the bond in this case, as there is no material difference between the provisions of the two. In the case at bar the provision of the bond is as follows: "In the event the said G. H. Wright Contracting Company shall faithfully and properly perform the foregoing contract according to all the terms thereof, and shall, as soon as the work contemplated by contract is completed, pay to the proper parties all amounts due for materials and labor used and employed in the performance thereof; then this obligation to be void; otherwise in full force and effect, and the same may be sued on at the instance of any materialman, laboring man or mechanic, in the name of the city of St. Louis, to the use of such materialman, laboring man or mechanic, for any breach of the condition thereof."

The language of the bond clearly states what was the intention of the parties thereto. It first guarantees that G. H.

Wright Contracting Company would faithfully and properly perform all the terms of the contract, and hold the city harmless for all damage it might sustain by reason of the breach thereof, and for the payment of all sums due for labor and materials performed and furnished upon the works.

The principle of *expressio unius exclusio alterius* applies with great clearness to the facts of the case. The bond not only named the third parties for whose benefit it was given, but it went further, by way of limitation, and stated what third parties could sue thereon. If the designation of the third parties who could sue on the bond did not amount to the limitation, the third parties for whose benefit the contract was made, then why name them at all, because otherwise not only those named but all others could maintain a suit if respondent is correct in its contention.

⁴⁶⁶ In the case of *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, 23 L. R. A. 146, the water company, for a valid consideration, agreed to furnish the town and its citizens good, clear and wholesome water in sufficient quantities for fire and other purposes, and in case the company failed to supply sufficient water to extinguish fires, then it should be held for all damages occasioned by such failure.

In March, 1899, Howsmon's house was burned because the water company failed to supply sufficient water to extinguish the fire. He sued the water company for damages, and alleged the breach of the contract with the city of Trenton as the cause of his injury. And the court, in passing upon that question, used the following language: "It is not every promise made by one to another, from the performance of which a benefit may ensue to a third party, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit, as its object, and he must be the party intended to be benefited"; citing cases.

And, continuing, the court said: "In other words, the rule is not so far extended as to give to the third person, who is only indirectly and incidentally benefited by the contract, a right to sue upon it. . . . The town of Trenton had power to pass ordinances 'to prevent and extinguish fires' and, as incident thereto, power to contract for a supply of water for that purpose. But it would seem, under the authorities cited,

that plaintiff cannot maintain this action for cogent reasons, which may be put in several ways:

“1. Although it was within the power of the town by contract to supply water to extinguish fires, it did not owe the duty of extinguishing fires to plaintiff: *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444. Consequently, the case is not within the lines of adjudicated cases ⁴⁶⁷ which maintain the exception to the rule that suit upon a contract must be brought by a party to the contract in cases where the promisee owed a duty to the third party, which the promisor undertook to perform.

“2. A municipal corporation, in making contracts for its citizens, acts for them collectively, and for all of them in every act, and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civil duty by any individual citizen.

“3. The benefits to be conferred upon the individual citizen by the contract are incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity.

“4. It does not appear that it was made for the benefit of a citizen in his individual capacity, but for the municipality, and in the absence of an express power in the municipality to make contracts for the indemnity of its individual citizens, should be so construed.

“5. The relation that the contractor sustained to the town was that of its agent or servant to carry out the obligations of the contract upon its part for the benefit of all the citizens; for the enforcement of the terms thereof the citizens must look to the authorities of the city, and cannot individually maintain an action for a breach of the contract.

“6. The town has no authority to make a contract to indemnify a citizen for the loss of property, . . . and therefore could not make such a contract that would be binding upon another.”

The city has no more authority in this case to make a contract to benefit the adjacent property than the town of Trenton had to indemnify a citizen for the loss of property, caused by fire. The fire protection in the one case may be as beneficial to the property owner as street improvements might be to him in this case.

The principle of law announced in the Trenton ⁴⁶⁸ case is applicable to the facts of the case at bar, and is decisive hereof.

3. The respondent seems to lay great stress upon its contention that the city is the legal agent of the property owners while performing its public duties in the improvement of streets of the city.

Various phases of that question have often been before the courts of this country, and have received very careful and deliberate consideration.

All of the well-considered cases start out by the assertion of the broad proposition that the contract must be made for the benefit of the third parties, as its object, and they must be the parties intended to be benefited thereby: *Simson v. Brown*, 68 N. Y. 355; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, 23 L. R. A. 146.

That being true, the question naturally presents itself, For whose benefit was the contract of improvement made in that case? We attempt to answer this particular phase of the question involved in paragraph 2 of this opinion by citing the constitution, which provides that all taxation shall be for public purposes, and draw the conclusion therefrom that the object of the contract—the street improvement—was for the benefit of the city and the public at large, because it was to be paid for by taxation, which could not be done if the improvements had been for third parties, the property owners, who were not parties to the contract. We believe the conclusion there reached was sound, but the respondent contends that while that was one of the objects, yet there was another object or purpose intended to be accomplished by it; and that was to enhance the value of the adjacent property, and thereby create or establish a fund, as it were, upon which the assessment could be levied for the payment of the tax bills, otherwise they would be void, their validity resting exclusively upon benefits. That is true, but the sole intention of the city in creating that fund was to provide a fund out of which the tax bills ⁴⁶⁹ could be paid, and in one breath the city created the fund, and in the next it assigned it to the contractor, and thereby prevented it from passing to and vesting in the property owners until the improvements were completed according to the terms of the contract, and not then until they exercised their option to accept the benefits so created and actually paid for the same, and neither the city nor anyone

else could exercise that option for them, except agents of their own creation.

A personal judgment against a property owner for street improvements is void, and any statute authorizing such a judgment is unconstitutional: *Neenan v. Smith*, 50 Mo. 525; *St. Louis v. Allen*, 53 Mo. 44; *Carlin v. Cavender*, 56 Mo. 286; *City of Louisiana v. Miller*, 66 Mo. 467; *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295.

So it seems clear to us that whatever benefits may accrue to the property owners as a result of street improvements are purely incident to the improvement, and not an object intentionally sought to be obtained by the contract which was made for the improvements. Third persons who are only collaterally and incidentally benefited by the terms of a contract have no cause of action for its breach: *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, 23 L. R. A. 146.

The courts are not uniform in their opinions as to the principle upon which this class of actions are maintained. Many of them base their opinion upon the ground that the obligee in the contract owed the third party some debt or duty, either legal or equitable, and that by accepting the contract the law creates a privity of consideration between them upon which he could maintain a cause of action for its breach: *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

But in applying that principle to this case, we are confronted with the proposition that the city owed no duty to the property owners to increase the value of ⁴⁷⁰ the property, but was merely creating a fund or providing a means out of which or by which the contemplated improvements could be paid. To this proposition the respondent might reply that while that may be true, yet the law required the city to let the contract at the lowest price obtainable, and that the property owners had the right to avail themselves of that price.

In answer to that contention it may be said that in all the cases where third parties have been permitted to recover upon a contract entered into for their benefit, said third parties had either adopted the contract or complied with the provisions thereof relating to them, or the debt or duty which was owing to the third party had passed to or vested in the obligee of the contract before the suit was instituted. We have examined many cases and have not found a single exception to that rule.

The property owners in this case do not fall under that rule. They never adopted the contract, they never performed any duty imposed upon them by it, nor has the city turned over to the appellants anything of value it owed to the property owners as a consideration for the contract between it and the appellants.

In the whole procedure for street improvements there is not an act authorized to be done by the city that has even the color of agency about it in so far as the property owners are concerned, except that it shall let the contract for the work to be done to the lowest bidder. But when the whole scheme of the procedure is investigated, it will be seen the city does not act for, nor pretend to act for, the property owners.

The owners of these lots were not parties to the contract. The proceedings as to them are in invitum, and their property is not affected until it is brought within the strict meaning of the statute, and even that does not affect the owner without he voluntarily accepts the benefit and pays therefor: *Thornton v. Clinton*, 148 Mo. 648, 50 S. W. 295; *Sweany v. Kansas City R. R. Co.*, 54 Mo. App. 265.

So in the absence of an ordinance or a contract expressly providing therefor, we must hold that the defendants are not liable under the bonds sued on for the damages claimed to have been sustained by the property owners.

4. Both parties to this suit have presented and discussed in their briefs several other points, but the view we have taken of the case renders it unnecessary for us to discuss them in this opinion.

The city is not asking for damages in this suit in its own behalf.

For the reasons above stated the judgment of the circuit court is reversed.

All concur.

The Right of a Third Person to Sue on a Contract made for his benefit is the subject of a note to *Baxter v. Camp*, 71 Am. St. Rep. 176. It has been affirmed that under a contract between a city and a water company by which the latter agrees to furnish the former water sufficient for fire and private purposes, a citizen cannot maintain an action against the water company for the destruction of his property through its failure to fulfill its contract with the city: *Bush v. Artesian etc. Water Co.*, 4 Idaho, 618, 95 Am. St. Rep. 161.

CHRISMAN v. LINDERMAN.

[202 Mo. 605, 100 S. W. 1090.]

VENDOR AND PURCHASER—Mistake—Dower.—If the purchaser at an administrator's sale obtains the fee simple title to the decedent's homestead, under the mistaken belief on the part of the administrator, shared in by the purchaser or induced by his fraud, that it is subject to dower, and the purchaser does not pay for that, he may be compelled to pay the value of the dower interest. (p. 826.)

DOWER—Destruction of.—Nothing except a plain mandate of the statute, or a statutory command, deduced by necessary implications, will suffice to set aside and destroy the dower right. (p. 826.)

DOWER—Homesteads—Merger.—The right of the wife to dower does not merge in her homestead. (p. 826.)

DOWER—Homesteads—Construction of Statute.—A statute providing that no dower shall be assigned to the widow when the homestead is greater than one-third of the real estate of which the husband died seised does not destroy the dower right. It continues to exist in the homestead, but the widow's right to its assignment is suspended during the existence of the homestead estate entirely overlapping it. (p. 831.)

DOWER—Homesteads—Remarriage.—Although a statute may forbid the assignment of dower when the homestead is greater than one-third of the decedent's estate, yet when the widow loses her homestead by marriage, she can then assert her claim to dower. (p. 833.)

DOWER—Homesteads—Remarriage—Sale of Dower Right.—If a widow has a homestead in all of the land owned by her husband at the time of his death, and she remarries, thereby losing her homestead, her dower right is not thereby extinguished, and a sale by the administrator of such land to pay the husband's debts does not convey to the purchaser the widow's dower. (pp. 834, 835.)

N. A. Franklin, for the appellants.

Higbee & Mills, for the respondent.

600 LAMM, J. Anthony Wishon departed this life in Putnam county in 1898, leaving behind him a widow (Thirsey), a homestead and debts, but neither will nor child. The public administrator of said county, one Chrisman, under orders of the probate court, took upon himself the burden of administering upon Wishon's estate. The widow remarried—her new yoke-fellow being Menzo House.

Presently thereafter said administrator commenced proceedings to sell the homestead to pay debts, which proceedings ripened into an order of sale, a sale and an approval thereof and an administrator's deed in 1900—defendant Linderman becoming the purchaser at an expressed consideration of twelve hundred and fifty-four dollars and seventy-five cents.

It seems the homestead comprised sixty-five acres of land, and it stands conceded that its value, as agreed on between Chrisman and Linderman, was fifteen hundred dollars.

After the administrator's sale and deed a squabble arose between Chrisman, Linderman and the former widow, Mrs. House, over her right to dower; and this suit in equity resulted, whereby the administrator seeks to recover of Linderman two hundred and forty-five dollars and twenty-five cents, a sum said to represent Mrs. House's dower right, it being the difference between the sum paid by Linderman to the administrator and said actual value of the land. The suit resulted in a decree in favor of the administrator in said \$10 sum, which amount was made a charge upon the land, and from that judgment Linderman appealed to the Kansas City court of appeals.

On the theory that title to real estate was involved, that court transferred the cause to this court.

Three petitions were filed by plaintiff. Defendant Linderman lodged demurrers against the first two, having for grounds that they did not state facts sufficient to constitute a cause of action. These demurrers were successively sustained. Thereat plaintiff filed a second amended petition. This in turn was challenged by a pleading called in the record a motion to strike out. The motion, however, is a dual pleading. In so far as the grounds of the motion aver a departure from the original petition, it may be technically considered a motion to strike out. But the motion did not stop there; it took a further step, and, assuming the office of a demurrer, challenged the petition as not stating facts sufficient to constitute a cause of action. Whether it be deemed a motion or demurrer, it was overruled and defendant excepted, and stood on his motion.

In this court it is argued by defendant's learned counsel that the second amended petition states no cause of action. It is also argued that if it states any cause of action, it is a new and different cause of action from the one stated in the original petition—in other words, that the second amended petition, placed side by side with the original petition, shows a departure.

As we interpret plaintiff's contention, it is, first, that there is no departure; and, second, that if departure there be, such departure arises in the first amended petition and not in the second amended petition—that is, that the two amended peti-

tions state the same cause of action; and if any vice of the character insisted upon by defendant exists, it can be seen only when the first amended petition is placed side by side with the original petition. And plaintiff goes further, and seeks ⁶¹¹ to avoid the force of defendant's claim of departure by insisting that when a demurrer was lodged against the first amended petition, the effect of that form of pleading was to waive the departure, and, said departure being waived, the right to insist upon it (once lost) cannot be revived.

These questions of pleading are learnedly discussed by counsel, pro and con; but in the view we take of the case, they are not decisive, and therefore need not be considered.

Our notion is that the turning point in the case is in defendant's main contention, to wit, that the petition states no cause of action, and that the court had no jurisdiction to enter the decree it did. The ultimate question involved in this contention may be formulated as follows: If a widow be vested with a homestead on the death of her first spouse (that being all the real estate of which he died seised), does she lose, not only her homestead, but also her dower, by a remarriage?

In order to show how the foregoing question arises on the record, it will be well to squeeze into a nutshell the constitutive elements of plaintiff's cause of action as set forth in a voluminous bill. Thus: After averring the facts hereinbefore set forth, it is alleged that on the death of Wishon his homestead vested in his widow, Thirsey, during her lifetime or widowhood, as her homestead, and that she had no dower therein; that she continued to occupy the homestead after the death of Wishon until she married Menzo House; that by her marriage she forfeited her homestead and all title in and to said premises; that after the order of sale by the probate court, and prior to the purchase by Linderman, he and the administrator opened negotiations for the purchase of the land at private sale under the terms of the order; that Linderman believed, or pretended to believe, that Mrs. House had dower in the land, and stated such to be a fact to the plaintiff; that the widow did the same, and ⁶¹² was represented by an attorney who gave similar assurances; that plaintiff did not have the advice of counsel and believed said representations; that as the result of said negotiations, and moved thereto by said representations, it was agreed between plaintiff, Linderman and Mrs. House that the land was worth fifteen hundred dollars, and Linderman would pay that price; that the inter-

est of the estate of Anthony Wishon in the land was valued at twelve hundred and fifty-four dollars and seventy-five cents, and the pretended dower at two hundred and forty-five dollars and twenty-five cents, and Linderman was to pay the first-mentioned sum to plaintiff, and the latter sum to Mrs. House, she and plaintiff agreeing to convey said respective interests to Linderman; that plaintiff reported the sale, the report was approved, and he made his deed in accordance with the agreement, which deed conveyed all the interest and estate of deceased in the premises; that it was understood between plaintiff and Linderman that plaintiff was conveying and Linderman was acquiring by that deed the fee simple title, subject to the dower; but this was a mistake of fact, superinduced by plaintiff's ignorance and by the aforesaid representations; that, in truth and in fact, plaintiff sold and conveyed the fee simple title absolute, subject to no dower interest—plaintiff thereby conveying and Linderman thereby receiving a greater interest than plaintiff intended to convey or than Linderman pretended to believe he was receiving; that if Linderman was honest in his representations, then the mistake was a mutual mistake of fact; but if dishonest in his representations and beliefs, then he intentionally practiced a fraud upon plaintiff; that at once upon receiving plaintiff's deed Linderman turned about and snapped his fingers at Mrs. House, claiming she had no dower; but that he had acquired the full fee from plaintiff by his administrator's deed, and he thereupon refused to pay the widow said sum; that defendant is responsible for plaintiff's mistake of fact relating to said dower and his belief in its existence, and thereby secured the fee ⁶¹³ simple title to said premises for the sum of twelve hundred and fifty-four dollars and seventy-five cents, instead of for fifteen hundred dollars, which by the contract of sale he agreed to pay, and thereby wronged the estate of Anthony Wishon out of the difference. Wherefore, plaintiff prays judgment for said sum, and that the same be declared a lien, etc.

1. The foregoing sufficiently states the averments of the second amended petition; and when it is further stated that the case passed off below in such form that the allegations of the petition are to be taken as true because defendant stood mute, while plaintiff stated his paper case to the foregoing effect, it will be seen that the matter is sufficiently developed to show that the question controlling the very right and jus-

tice of the case is whether or not Mrs. House has dower. If she has dower, then plaintiff is intermeddling and ought not to recover; for Linderman must settle with her. If, on the other hand, she has no dower, then plaintiff should recover; for it would be an intolerable reproach to the law to allow a purchaser to take the whole estate under guise of paying for part only, when such result was produced by an honest mutual mistake of fact, or an honest mistake of mixed law and fact, or a mistake of both or either kind born of the fraud of the purchaser; and so it is written: 1 Beach on Modern Equity, 1st ed., sec. 38, p. 37; Griffith v. Townley, 69 Mo. 13, 33 Am. Rep. 476; Corrigan v. Tiernay, 100 Mo. 276, 13 S. W. 401; Summers v. Coleman, 80 Mo. 488; Smith v. Patterson, 53 Mo. App. 66; Needles v. Burk, 81 Mo. 569, 51 Am. Rep. 251.

2. The question presented is *res integra*; and at the very threshold of its consideration it is pertinent to inquire what is the correct judicial attitude toward dower. To ascertain that attitude we may give heed to the pertinent maxims of the law; for, "A maxim," says Coke, "is so called because its dignity is chiefest, and its authority the most certain, and, because it is universally approved by all": Coke's Littleton, 11a. ⁶¹⁴ Again he says: "A maxim is a proposition to be of all men confessed and granted without proof, argument, or discourse": Coke's Littleton, 67a. "Maxims," says Sir James Mackintosh, "are the condensed good sense of nations." The rule (i. e., the maxim) measuring the force of legal maxims is: "In default of the law, the maxim rules." (*Regula pro lege, si deficit lex.*) Referring to dower, the maxims are: "The law favors dower; it is a reward of chastity, therefore it is to be preserved": Coke's Littleton, 31a. Again: "In doubt the response is in favor of dower, liberty, innocence, of the possessor, of the debtor, and of the defendant": Brown's Law Dictionary, Appendix. *In dubio pro dote*, etc. Again: "Law favoereth life, liberty, dower": 14 Bac. 345. Again: "Where there is marriage, there is dower": Bract. 92. And the converse: "No marriage, no dower": Wait v. Wait, 4 Barb. (N. Y.) 192.

It may, accordingly, be justly said, we think, that the correct judicial attitude toward dower is this: Dower, being a cherished and immediate jewel of the common law, preserved for and presented to us in a statutory setting, all doubts are to be resolved in its favor; courts will not allow the right of dower to be wasted and frittered away in piecemeal by sour or

austere construction, by overnice refinement in gloss. In short, nothing except a plain mandate of the statute or a statutory command deduced by necessary implication will suffice to set dower to one side. And this is so because dower, as seen above, keepeth excellent company in the law, to wit, the company of life and liberty (the three abiding together in favor). So that the law lifts the light of a comfortable countenance thereon out of tender regard for the widow.

3. Nevertheless, dower may be lost. For instance, it being "a reward of chastity," it was lost at common law by the wife's adultery. Thus speaketh the oracle of the common law in that behalf: "A woman leaving her husband of her own accord, and ⁶¹⁵ committing adultery, loses her dower, unless her husband takes her back of his own accord": Coke's Littleton, 32b. Declarative of the common law in that regard is our statute: Rev. Stats. 1899, sec. 2953. So, too, a woman is declared not to be endowed in case of a divorce secured by her husband for her fault or misconduct: Rev. Stats. 1899, sec. 2947. Moreover, she may lose her dower right on becoming sui juris by acts amounting to an estoppel in pais: Hart v. Giles, 67 Mo. 175. Furthermore, she may lose her dower by the statute of limitations: Long v. Kansas City Stockyards Co., 107 Mo. 298, 28 Am. St. Rep. 413, 17 S. W. 656; Null v. Howell, 111 Mo. 273, 20 S. W. 24. She had no dower at common law in the war castle of her lord; hence, by analogy she has been held to have no dower in a railroad right of way—the public use in that regard standing as and for a warlike castle: Venable v. Wabash U. R. R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; Chouteau v. Missouri Pac. R. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299. She may bar her dower during her marriage by deed, executed jointly with her husband (Rev. Stats. 1899, sec. 2946), and it goes without saying that she may convey away her dower after she becomes discovert. Absent any words evincing a contrary intent, at common law a devise of real estate to her in her husband's will was in addition to dower: Schorr v. Etling, 124 Mo. 42, 27 S. W. 395. But the statutory rule is otherwise, and unless she by renunciation of the will avoids a devise of real estate made to her by the will of her husband, she is barred of dower by such devise: Rev. Stats. 1899, sec. 2949. Certain options are given to her by the statute, and she may elect to take a certain share in her husband's estate under given conditions in lieu of dower—all of these elections, be it noted, involving a

choice in her for the possible betterment of her estate: Rev. Stats. 1899, secs. 2939-2945, inclusive. So, too, her dower may be barred by an antenuptial contract entered into understandingly and supported by an adequate consideration: Rev. Stats. 1899 sec. 2950.

But it is not amiss in the consideration of the case ⁶¹⁶ at bar to note that in the absence of election, conveyance or other bar, as aforesaid, the manifest intent of our statute on dower, as read in the lines and between the lines—that is, in the letter as well as in the very soul of the statute itself—is that the widow's common-law right of dower is to be kept inviolate; and that right is set forth in the first section of the dower act (Rev. Stats. 1899, sec. 2933), thus: "Every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seised of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower in the manner prescribed by law, to hold and enjoy during her natural life": See 1 Rev. Laws 1825, p. 332.

In fact, dower seems to be dear as the apple of its eye to Missouri statutory law, as it was to the common law of our ancestors; and so it is provided that "No act, deed or conveyance, executed or performed by the husband without the assent of the wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estate of married women, and no judgment or decree confessed or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter"—i. e., chapter 21 on Dower: Rev. Stats. 1899, sec. 2946.

We are now asked to hold that a widow's dower right, a right she may guard and re-establish by a suit in equity during the lifetime of her husband, a right granted her, as seen, by the common law from a time when the memory of man runneth not to the contrary, and which (jealously preserved in statutory law during the whole life of the state of Missouri) the courts are quick to see and astute to aid, is lost by remarriage in every case where the real estate of which her husband died seised is of such modest amount that it also ⁶¹⁷ constitutes a homestead; for this conclusion the learned trial judge felt constrained to draw by the interpretation placed by him upon the provisions of the homestead statute, presently to pass under review.

4. The material provisions of the statutes relating to homesteads, referred to in paragraph 3 of this opinion, are sections 3620 and 3621 of the Revised Statutes of 1899. Section 3620 reads as follows: "If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid [fifteen hundred dollars] shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow; that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband; and the probate court having jurisdiction of the estate of the deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto."

Section 3621 reads as follows: "The commissioners appointed to set out such homestead shall, in cases where the right of dower also exists, also set out such dower, and they shall first set out such homestead, and from the residue of the real estate of the deceased shall set out such dower, but the amount of such dower shall be diminished by the amount of the interest of the widow in such homestead; and if the interest of the widow in ⁶¹⁸ such homestead shall equal or exceed one-third interest for and during her natural life, in and to all the real estate of which such housekeeper or head of a family shall have died seised, no dower shall be assigned to such widow."

It will be seen that by section 3620 the homestead right passes to and vests in the widow or minor children, or in both, if both there be. It continues for her benefit during her natural life unless she remarries. If she remarries, her homestead ceases: *McKee v. Stuckey*, 181 Mo. 719, 81 S. W. 160.

It will be seen that under section 3621, *supra*, where both homestead and dower exist, the commissioners appointed to set out homestead shall also set out dower. But the two estates are recognized as somewhat akin to each other. Hence, it is provided that the homestead shall be set out first and that

the dower shall be diminished by the interest of the widow in the homestead, and that "no dower shall be assigned to such widow" when the homestead equals or exceeds one-third interest for and during her natural life in and to all the real estate of which the housekeeper or head of the family died seised.

Our statutes establishing and setting metes and bounds to the purely statutory estate of homestead being in the foregoing terms, the argument of plaintiff's learned counsel runs plausibly and shrewdly in this wise: the real estate of Wishon was his homestead—no more, no less. Now, the statute vests that homestead, eo instanti and will ye, nill ye, on his death in his widow; ergo, by operation of law her dower was swallowed up and lost in her homestead (i. e., all her eggs were placed in one basket). She marries House; ergo, her homestead is lost; and her homestead being lost, all is lost.

But we are not persuaded that such argument is sound, nor that the conclusion drawn is sound. This is so, because:

619 (a) If the dower estate was merged into the homestead estate, then there would be great force in the argument that if the homestead was lost, such loss took with it the dower estate. But the rule at law relating to merger is stated to be: "That where a greater estate and a lesser coincide and meet in one and the same person in the same right, without any intermediate vested estate, the less is immediately annihilated, or, in law phrase, is said to be merged—that is, sunk or drowned—in the greater; and the same rule applies to the union of a legal estate with an equitable estate or interest, the latter being thereupon extinguished. After merger the greater estate, still subsisting, continues of precisely the same quality and extent of ownership as before, while the lesser with its characteristics is extinct": 20 Am. & Eng. Ency. of Law, 2d ed., 588.

The same standard authority states the rule relating to merger in equity as follows (2 Am. & Eng. Ency. of Law, 2d ed., 590): "In equity the legal rule of merger is not regarded as inflexible, and the question whether the doctrine of merger applies or not is determined by the intention of the party in whom the estates unite, provided that his intention is determined by the party's expressed declaration, or, where there is no declaration, or the party is not capable of electing as to merger, intention will be presumed in accordance with

his interests as disclosed by an examination of all the circumstances of the case."

It has been held that in equity estates are kept distinct when the interest of either party requires it; that merger is not favored in equity, and never takes place contrary to the intention of the parties or the requirements of justice: See a learned note on page 1234, volume 4, Current Law. To the same effect are *Hospes v. Almstedt*, 83 Mo. 473; *Sater v. Hunt*, 66 Mo. App. 527; *Danhouse's Estate*, 130 Pa. 256, 18 Atl. 621. In *Wallace v. Blair*, 1 Grant Cas. (Pa.) 75, it was held: "As the ⁶²⁰ merger is for the benefit of him in whom the two estates unite, it will never take place when it is against his interest, or when it is most for his advantage to keep the charge alive": See *McLeery v. McLeery*, 65 Me. 173, 20 Am. Rep. 683; *Jameson v. Hayward*, 106 Cal. 682, 46 Am. St. Rep. 268, 39 Pac. 1078; *Wettlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449, 94 N. W. 950.

Applying the doctrines of merger to the facts in judgment, it cannot be said there was any merger of the homestead and dower interests. There being no expressed intention of the widow and the law alone creating the condition present, the law will not force a merger contrary to the interest of the widow. We do not have to decide that the homestead estate is superior to the dower estate for the purposes of merger. Such estate may in a given instance be superior in quantity, but it would seem to be inferior in quality, because the homestead is determinable by marriage, whereas dower is determinable by death. The two events being dissimilar in essence, the one rests in caprice, the other in necessity. All we are obliged to hold, and what we do hold, is that it was not to the interest of the widow to force a merger of the two estates which met in her, and hence no merger will be presumed.

(b) But plaintiff insists the homestead statute, *ex vi termini*, destroys dower where the homestead is greater than one-third of the real estate of which the husband died seised. But we do not so read the statute. It does not say (in *totidem verbis*) that in such case the widow shall have no dower, or that her dower is lost. The language of the statute is (section 3621, *supra*) that under such circumstances "no dower shall be assigned to such widow." Now, dower is an estate vested by law, inchoate during the life of the husband and cast upon the widow upon his death; while the assignment of

dower is defined thus: "The assignment of dower is ascertaining a widow's right of dower by laying out or marking off one-third of her ⁶²¹ deceased husband's lands, and setting off the same for her use during life": Black's Law Dictionary. Thus it appears that dower is one thing and the assignment of dower is essentially a different thing. One is an estate, the other smacks of the remedy for segregating the estate. When the statute, therefore, says that no dower shall be assigned, it falls far short of saying that the widow's right of dower is lost or drowned in a greater estate.

In our opinion, all the statute means is this: Given a homestead greater in extent than common-law dower, then the courts shall remain passive and refuse to assign—that is, admeasure and mark off the dower interest while the homestead exists in the widow. To mark out dower in the homestead in such case would be a vain and useless thing. Albeit, the dower right is left, but left latent merely—covered up, as it were, and its assignment cannot be enforced in the homestead while the widow's homestead exists. But if we may be allowed a trope, as the stars come out when the sun goes down, so when such homestead right disappears, the right to assignment of dower reappears—suspended during widowhood, it revives again on remarriage, at the precise time assignment of dower would have any meaning or vitality in the case in hand. Certain it is that a woman takes dower in accordance with the law in existence when her husband dies. Certain it is that the legislature may legislate in regard to dower. But, as said, our dower statute should not be held as subject to repeal by anything short of express repeal, or repeal by inexorable implication. The homestead statute and the dower statute are not antagonistic to each other, but they must be construed together. No provision in either should perish by construction unless there is no reasonable escape from such construction. In the case at bar the provisions of the dower and homestead statutes pertinent to the issues may be construed harmoniously ⁶²² with each other, and we adopt the construction that dower continues to exist in the homestead, but the widow's right to its assignment was suspended during the existence of a homestead estate entirely overlapping it.

(c) But it is further argued by plaintiff's counsel that the homestead statutes have been construed as contended by them, and adversely to the foregoing view. Plaintiff's counsel put their finger on several cases which they say support their

view; for example, *Bryan v. Rhoades*, 96 Mo. 485, 10 S. W. 53. A close reading of that case will show that the exact point here was not in judgment there. It is said there that "if the widow's interest in the homestead equals or exceeds in amount dower in the entire estate, then she can have no dower." The action was for the assignment of dower and the setting off of a homestead, and all necessary for the court to say, and what it meant to say, was that in such condition of things there can be no assignment of dower. We are cited to the case of *Gore v. Riley*, 161 Mo. 238, 61 S. W. 837. In that case an attempt was made to have us say that as the minor children had an interest in the homestead with the widow, each was entitled to a certain or definite part for the time each should have it, and that such interest has a fixed value; so that, when the homestead was set off to the widow and minor children, the widow's interest should have been computed as diminished by the interests of the minor children and enough more land added to her homestead interest (as computed) to have made up one-third of value in the whole real estate. For reasons suggested by Burgess, J., this court refused to follow that lead, and, *arguendo*, *Bryan v. Rhoades*, 96 Mo. 485, 10 S. W. 53, is quoted from. There is nothing in that case that militates against the conclusion we have heretofore announced. The same may be said of the other cases relied upon.

623 As tending to show the astuteness which courts evince in protecting the interests of widows, attention may be called to a line of decisions construing section 3621, *supra*, wherein the widow elected under the dower act to take a child's part in lieu of her common-law dower; and these cases, when closely read, will be found by parity of reasoning to sustain the argument advanced in this opinion. For instance, in *Adams v. Adams*, 183 Mo. 396, 82 S. W. 66, it was held that a widow who has elected to take one-half of the estate of her deceased husband absolutely, subject to his debts, is entitled in addition to a homestead in the other half of the land. In other words, section 3621 was held to apply solely to common-law dower and not to the estate which the widow may elect to take in lieu of dower, which has been aptly called "election dower." To the same effect is *McFadin v. Board*, 188 Mo. 688, 87 S. W. 948, and *Quail v. Lomas*, 200 Mo. 674, 98 S. W. 617. See, also, *Casteel v. Potter*, 176 Mo. 76, 75 S. W. 597.

(d) Finally it is argued that when the legislature in 1895 (Laws 1895, pp. 185, 186) amended the homestead law so as to make the widow's homestead right determinable on her remarriage, the gist of the legislative object was hostility to the remarriage of widows; and the argument seems to be that the courts should further that object by making the punishment for her remarriage as severe as possible, and, to that end (in terrorem), should strike down both dower and homestead. Whether the legislature was actuated by so ungallant a motive or no is not for us to inquire or decide. Suffice it to say that courts get at the legislative intent through the language employed to evidence that intent. The language employed is alone directed to an annihilation of the homestead estate. It may have been in the legislative mind that a new object of adoration should not be installed in the old home—that the children of a decedent sharing that home should not be ruled over by the alien hand of a ⁶²⁴ stepfather, who, peradventure, might waste the substance of the estate and render the widow less able to support and educate the children of decedent, or exhaust the fountain of love singular to them. Courts have not hesitated to enforce provisions of wills making a devise to the widow void in case of her remarriage: See *Dumey v. Schoeffler*, 24 Mo. 170, 69 Am. Dec. 422; and many other cases might be cited to the same effect, so that, in accordance with the legislative will, courts should enforce the present homestead law whereby the widow loses her homestead in case of her remarriage. But while not lagging behind, we will not be hurried by construction into running in advance of the written law; and it will be time enough to hold, when the legislature says so without equivocation or doubt, that a widow loses her dower right by remarriage; that is to say, if a widow is to be thus stripped because (peradventure) she pays a tribute to the virtues of her first husband by seeing his similitude in a second, or, contra, because (as sourly put, in substance, by Doctor Johnson) she allows Hope to triumph over Experience by taking a second, then, such effect must be produced by a stroke of legislative, rather than judicial, power.

The widow of Wishon has dower in the real estate in question, and, therefore, plaintiff, as administrator of the estate, was not entitled to recover the value of that dower to pay

debts. This being so, the judgment is for the wrong party, and is, therefore, reversed.

All concur, except Woodson, J., not sitting.

The Merger of Dower in other estates is discussed in the note to *Forthman v. Deters*, 99 Am. St. Rep. 156. A quitclaim deed from heirs to the widow does not merge her right to dower in the premises if its continuance is beneficial to her: *Wettlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

ROSE v. NORTHERN PACIFIC RAILWAY COMPANY.

[35 Mont. 70, 88 Pac. 767.]

APPEAL—Matters not Reviewable.—If the moving papers upon which an application to vacate a default were made in the lower court are not embraced in the bill of exceptions, the appellate court cannot review the ruling made thereon. (p. 838.)

CARRIERS—Contracts Limiting Liability for Loss—Baggage.—A railroad ticket signed by the passenger containing a recital that in consideration of its being sold at a reduced rate the passenger agrees that the value of his baggage shall not exceed a certain amount, is a sufficient consideration for any contract which the carrier may lawfully make respecting the transportation of both passenger and baggage, and it is not necessary that there be an independent consideration for each and every paragraph or provision of the contract of transportation to make it binding, as all such provisions, taken together, constitute one entire contract. (p. 839.)

CARRIERS—Contracts Limiting Liability for Loss of Baggage—Evidence.—If a railroad ticket reciting that, in consideration of its being sold at a reduced rate, the carrier's liability for loss of the passenger's baggage is limited to a certain amount, is signed and accepted by the passenger, evidence, in an action to recover for loss of baggage, that nothing was said to the passenger about a reduced rate, or a limitation on the value of his baggage, is properly excluded as irrelevant. (p. 840.)

CARRIERS—Contract Limiting Liability for Loss of Baggage—Estoppel to Deny Knowledge of Contents.—A railroad passenger signing a ticket stipulating for a limitation upon the carrier's liability for the loss of such passenger's baggage, cannot, in the absence of fraud, be heard to say that he did not know nor understand the contents of such ticket. (p. 841.)

CARRIERS—Contract Limiting Liability for Loss of Baggage—Limited Tickets.—If a railway passenger signs and accepts a ticket reciting that in consideration of its being sold at a reduced rate, the carrier's liability for loss of the baggage is limited to a certain amount, the passenger cannot urge, in an action to recover for the loss of his baggage, as a ground of recovery that he did not know or understand the contents of such ticket, and that he should have been accorded an opportunity to determine for himself whether he would accept such limited ticket or procure an unlimited one. (p. 841.)

CARRIERS—Contract Limiting Liability for Loss of Baggage—Validity.—A carrier may validly limit his liability for the loss of baggage by stipulation in passenger tickets, that, in consideration of their being sold at reduced rates, the liability of the carrier for the loss of the passenger's baggage is limited to a certain reasonable stated amount. (p. 843.)

Mackel & Meyer, for the appellant.

Wallace & Donnelly and E. M. Lamb, for the respondents.

72 **HOLLOWAY, J.** Mrs. Edward Rose commenced this action in the district court of Silver Bow county against the Northern Pacific Railway Company and the Chicago, Burlington and Quincy Railway Company to recover the sum of seventeen hundred and seventy-five dollars, the alleged value of certain baggage lost by the defendants, and for two hundred and twenty dollars damages for mental anguish occasioned by such loss.

The complaint alleges that on January 11, 1905, the defendants received the plaintiff as a passenger on their trains, to be conveyed from Butte to Omaha, and also received for transportation her baggage consisting of a trunk containing her wearing apparel, of the value of seventeen hundred and seventy-five dollars; that the trunk and its contents were lost by reason of the negligence of the defendants, to plaintiff's damage in the sum of seventeen hundred and seventy-five dollars. It is also alleged **73** that by reason of this loss the plaintiff suffered mental anguish, by reason of which she was further damaged in the sum of two hundred and twenty dollars.

To this complaint the defendant Northern Pacific Railway Company interposed a general demurrer, which was afterward withdrawn and fifteen days allowed for answer. At the expiration of this period the default of this defendant was entered for failure to answer. Thereafter application was made to set aside the default and permit an answer to be filed. This application was granted. The answer of the defendant Northern Pacific Railway Company admits the loss of the plaintiff's baggage, but denies that its value was any sum greater than one hundred dollars; and alleges that the plaintiff traveled on, and her baggage was accepted for carriage and carried under and by virtue of, a special contract, one of the stipulations of which was that the plaintiff's baggage did not exceed in value one hundred dollars, and that the consideration of this contract was a reduced rate of transporta-

tion. This defendant admitted its liability in the sum of one hundred dollars.

The defendant Chicago, Burlington and Quincy Railway Company filed its answer, putting in issue all the allegations of the complaint, except that each of the defendants is a corporation organized and doing business in this state. The affirmative allegations of the answer of the Northern Pacific Railway Company were put in issue by reply. The cause was tried to the court sitting with a jury. After hearing the testimony the court directed a verdict in favor of the plaintiff and against the defendant Northern Pacific Railway Company for one hundred dollars, which was returned. From a judgment entered on this verdict and from an order denying her a new trial, the plaintiff appeals. Heretofore the appeals were dismissed as against the Chicago, Burlington and Quincy Railway Company.

During the course of the trial counsel for plaintiff sought to show that nothing whatever was said to Mrs. Rose about a reduced rate of transportation, or that the value of her baggage was not to exceed one hundred dollars. Upon objection this offered testimony was excluded. The assignments of error made in this court relate ⁷⁴ to the action of the district court: 1. In setting aside the default of the defendant Northern Pacific Railway Company; 2. In excluding the testimony above; and 3. In directing a verdict.

1. We cannot consider the first assignment on its merits. The moving papers upon which the application to vacate the default was made are not embraced in a bill of exceptions, and therefore are not identified. This court has no authoritative information as to what evidence was before the trial court, and therefore cannot say that it abused its discretion in this regard: *Rumney Land etc. Co. v. Detroit etc. Cattle Co.*, 19 Mont. 557, 49 Pac. 395; *Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121.

2. The other assignments present the same question, and they are considered by counsel together. It is urged by appellant, first, that there was not any consideration for the contract which assumed to limit the carrier's liability for the loss of plaintiff's baggage to one hundred dollars; and second, that even if there was a sufficient consideration, the contract to that extent is void as against public policy.

1. The facts disclosed by the evidence are that on January 9, 1905, H. F. Ruger, freight and passenger agent for the

Chicago, Burlington and Quincy Railway Company, at Butte, received from that company at Omaha a telegram in cipher which translated reads: "Furnish Mrs. Ed. Rose, 21 North Main, one first-class limited ticket Butte to Omaha, you to report ticket furnished on this telegram. Leave to-night if possible." The Burlington agent purchased a ticket of the description mentioned in the telegram, from the Northern Pacific Railway Company at Butte, and delivered it to Mrs. Rose after she had signed the same. The ticket contained: among others, these provisions: "In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried as follows, to wit: (8) That the value of my baggage does not exceed \$100; (11) That no agent or employé of any lines named in this ticket over whose road I am entitled by the ⁷⁵ terms of this ticket to travel, has any power to alter, modify or waive in any manner any of the conditions named in this contract." Immediately under the eleventh provision, which is the last one, is the signature of Mrs. Rose.

This ticket constituted a contract between the Northern Pacific Railway Company and Mrs. Rose for the transportation of herself and her baggage from Butte to Omaha: 6 Cyc. 570. It must be conceded that the reduced price at which the ticket was sold is a sufficient consideration for any contract which the company might lawfully make respecting the transportation of the passenger or her baggage. It is not necessary that there should have been a special or independent consideration for every separate paragraph or provision of the contract, for the consideration of the contract itself is a consideration for every provision in it. In other words, the ticket containing these eleven provisions, with the introductory clause quoted above, constitutes one entire contract.

In *Cau v. Texas etc. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. ed. 1053, it is said: "It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Mfg. Co. v. Illinois Cent. R. R.*, 3 Wall. 107, 18 L. ed. 170. In response it was said: 'The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses

by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.' In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations."

But it is said that the recital that the ticket was sold at a reduced rate was only prima facie evidence of the fact, and therefore the court should not have excluded the testimony offered. It is sufficient answer to say that no effort was made to show that in fact the ticket was not sold at a reduced rate. The ⁷⁰ only effect of the testimony sought to be introduced was that nothing was said to Mrs. Rose about a reduced rate or a limitation upon the value of her baggage. We think the court's ruling was clearly correct. In the first place, Mrs. Rose was not purchasing this ticket. It was furnished by the Burlington road or by some one in Omaha for her. What difference could it have made that no statements were made by the Burlington agent in Butte? As said above, it was not sought to show that any representations were in fact made, but only that no representations were made as to the rate at which the ticket had been furnished, or that the value of plaintiff's baggage was not to exceed one hundred dollars. If the evidence had been introduced, the situation of the parties would not have been different in any respect from what it is now.

The Burlington agent at Butte had specific directions to furnish Mrs. Rose a particular kind or character of ticket. He performed his duty fully when he furnished precisely the kind of ticket he was directed to furnish. There was not any legal obligation resting on Mrs. Rose to accept the particular ticket tendered to her. Doubtless, she could have purchased a different kind of ticket and one which would not have limited the amount of recovery for her baggage in case of loss, but she chose to accept this ticket and agreed that the value of her baggage did not exceed one hundred dollars. Furthermore, she agreed, under the eleventh paragraph of the contract, that the agent at Butte could not alter, modify or waive in any manner any of the conditions named in the contract. If, then, the agent could not vary the terms of the contract by any act or omission on his part, it is impossible to perceive the relevancy of the testimony offered.

But it is contended that Mrs. Rose was not aware of the terms of paragraph 8 of the ticket, as set forth above, and

that in any event she should have been accorded the opportunity to determine for herself whether she would accept this ticket with its limitation as to the value of her baggage or procure another kind of ticket by which she might have held the carrier for its full value. We do not think there is any merit in either of ⁷⁷ these contentions. The limitation mentioned in paragraph 8 was made by a plain provision on the face of the ticket, and the ticket was signed by Mrs. Rose. In the absence of fraud, a party to a written contract cannot be heard to say that he did not know or understand its contents. In *Cau v. Texas etc. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. ed. 1053, it is said: "There can be no limitation of liability without the assent of the shipper (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law: *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. ed. 872. Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed": See, also, Civ. Code, sec. 2204.

The second contention is likewise disposed of by the decision in the *Cau* case (194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. ed. 1053). It is said: "It is well settled that the carrier may limit his common-law liability: *York Mfg. Co. v. Illinois Cent. R. R.*, 3 Wall. 107, 18 L. ed. 170. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an 'option and opportunity must be given to the shipper to select under which (the common-law or limited liability) he will ship his goods.' If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily, the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him."

In our opinion, Mrs. Rose is not in any different position in this case from what she would have been had she gone to the agent of the Northern Pacific Railway Company in Butte and demanded from him a first-class limited ticket, and, as an inducement ⁷⁸ to secure a reduced rate, had specifically agreed to hold the company for no greater amount than one hundred dollars in case her baggage should be lost.

2. Is the contract void as against public policy? For the sake of this argument, it may be said that our codes declare the public policy of this state. Sections 970 and 2240 of the Civil Code are relied upon by counsel for appellant in their contention that the contract is void so far as paragraph 8 is concerned. These sections read:

“Sec. 970. A check must be affixed to every package or parcel or baggage when taken for transportation by any agent or employé of such railroad corporation, and a duplicate thereof given to the passenger; . . . if his baggage is not delivered to him by the agent or employé of the railroad corporation, he may recover the value thereof from the corporation.”

“Sec. 2240. That is not lawful which is: (1) Contrary to an express provision of law; (2) Contrary to the policy of express law, though not expressly prohibited.”

But there are other sections of the same code applicable here. Sections 2876 and 2878 read as follows:

“Sec. 2876. The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.”

“Sec. 2878. A passenger, consignor, or consignee, by accepting a ticket, bill of lading or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same.”

Considering the provisions of sections 970, 2876, and 2878 together, there appears to be but one conclusion which can be reached, viz., that, in the absence of a special contract limiting the carrier's liability, the provisions of section 970 would authorize the recovery of the actual value of the baggage lost; but it is lawful, under section 2878, for the carrier and passenger ⁷⁹ to agree, in a writing signed by the passenger, to a modification of the carrier's obligation to respond in dam-

ages for such actual value, and this seems to have been done in this instance.

In *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642, this court considered to some extent the question presented here, with reference to the right of a common carrier of property to limit its common-law liability by a special contract, and, among other things, said: "At common law the carrier is liable for the full amount of the damage resulting from his negligence. This liability may be limited by an express agreement made between the shipper and the carrier at the time of the delivery of the goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy: *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, 28 L. ed. 717; *Southern Express Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162. And where the parties have, by stipulation, fixed upon a value of the property, such stipulation has the effect of limiting the liability of the carrier, and is, to that extent, a defense to an action for damages."

In *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, 28 L. ed. 717, the same subject is considered, and it is there said: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

80 "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the

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purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting. and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." To the same effect is the decision in *Cau v. Texas etc. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. ed. 1053.

Section 2892 of the Civil Code provides: "The liability of a carrier for baggage received by him with a passenger is the same as that of a common carrier of property." Under the provisions of this section, the decisions cited above are directly applicable here.

While it may be admitted, for the purposes of this case, although not decided, that a carrier would not be permitted to contract against any liability whatever arising from its own negligence, that it may lawfully contract to limit such liability, provided the limitation is reasonable, can hardly be said to be open to doubt at this time, although there appears to be some conflict in the decisions: 6 Cyc. 399, 400. From the record presented in this case, it is impossible for this court to say that the limitation imposed in this instance was unreasonable.

We find no error in the record. The judgment and order are affirmed.

Mr. Chief Justice Brantly and Mr. Justice Smith concur.

Stipulations in Railway Tickets limiting carrier's liability for baggage are discussed in the note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 364-371. The general rule is that a carrier is an insurer of the safety of a passenger's baggage: *Nashville etc. Ry. Co. v. Lillie*, 112 Tenn. 331, 105 Am. St. Rep. 947.

CITY OF BILLINGS v. COOK.

[35 Mont. 95, 88 Pac. 656.]

MUNICIPAL CORPORATIONS—Livery-stable Ordinances—Validity.—A municipal ordinance requiring anyone desiring to engage in the livery-stable business to first obtain a permit from the city council, and the consent of a majority of the lot owners in the block, and exempting from its operation any livery-stable then in existence, is, as to one who has practically completed a livery-stable within the city limits, and made arrangements to operate it before the passage of the ordinance, void and inoperative as an unlawful discrimination between himself and others engaged in the same business at the time of the enactment of the ordinance. (p. 848.)

W. M. Johnston, for the appellants.

H. A. Groves, for the respondent.

¹⁰⁰ SMITH, J. This is an appeal from the judgment of the district court of Yellowstone county, finding the appellants guilty of a violation of Ordinance No. 223 of the city of Billings, and imposing a fine upon each of them.

The action was begun in the police court upon a complaint, which is as follows: "That on or about the twelfth day of April, A. D. 1906, within the corporate limits of the city of Billings, in the county of Yellowstone, state of Montana, the defendants committed the crime of unlawfully maintaining, conducting and operating a livery-stable in that the said J. F. Cook and B. M. Cox, then and there being, did, then and there, without first obtaining a permit from the city council of said city, maintain, conduct and operate a livery-stable on lots numbered thirteen (13) and fourteen (14) of block numbered one hundred and five (105) of the original town (now city) of Billings, Montana, according to the official plat thereof now on file and of record in the office of the county clerk and recorder of Yellowstone county, Montana, the majority of the buildings situated on said block, then and there, being residences, contrary to the provisions ¹⁰¹ of the ordinance of the said city of Billings, in such cases made and provided, No. 223, entitled: 'An ordinance regulating the location of livery-stables within the corporate limits of the city of Billings.' "

From a judgment of conviction in the police court the defendants appealed to the district court, where the cause was tried by the court, without a jury, upon an agreed statement of facts, the material portions of which are:

“(5) That on or about the twentieth day of February, 1906, said defendants did acquire and purchase at a cost of \$1,100 lots numbered thirteen and fourteen in block numbered one hundred five of the original town, now city, of Billings, and which is within the corporate limits of said city and within the residence district of said city, the majority of the buildings situate in said block being residences.

“(6) That immediately after acquiring and purchasing said lots said defendants began the construction of a livery-stable fifty feet in width by one hundred and thirty feet in depth, said lots being in the aggregate fifty feet in width and one hundred and forty feet deep; that said defendants constructed a foundation for said livery-stable at a cost of \$75.25, and made water and sewer connections therefor at a cost of \$195.00, and in addition thereto, in the construction of said livery-stable expended the sum of \$20.00 for hardware, \$955.00 for lumber, and \$214.00 for labor prior to the sixth day of March, 1906; and that on the sixth day of March, 1906, said defendants had a total sum of \$2,609.25 invested in said lots and in said livery-stable so partially constructed as aforesaid.

“(8) That said livery-stable, with the exception of the painting thereof, was practically finished and completed on the twelfth day of April, 1906, at an approximate cost of \$3,500, exclusive of the cost of lots, and that when finally completed and painted will cost said defendants about \$4,000.

“(9) That on the sixth day of March, 1906, at the request of certain property owners living in the city of Billings, the city council of said city passed Ordinance No. 223, which ordinance ¹⁰² was on that day approved by the mayor of said city, and is in words and figures following, to wit:

“ ‘Ordinance No. 223.

“ ‘An Ordinance Regulating the Location of Livery-stables within the Corporate Limits of the City of Billings.

“ ‘Be it ordained, by the city council of the city of Billings:

“ ‘Section 1. Any person or corporation desiring to construct, maintain, conduct or operate a livery-stable, within the corporate limits of the city of Billings, on any block where the majority of the buildings situate thereon are residences, must first obtain a permit from the city council as hereinafter provided.

“ ‘Sec. 2. Any person or corporation desiring to so construct, maintain, conduct, or operate a livery-stable as afore-

said, must file with the city council a written application in which must be stated the number of lots and block upon which he desires to construct, maintain, conduct or operate a livery-stable, the nature of the structure, the manner in which said livery-stable is to be conducted or operated, and a description of all buildings situate on said block and the purpose for which each is used. At the time of filing said application such person or corporation shall also file with the city council the written consent to the granting of such application of a majority of the lot owners of the block on which he desires to construct, maintain, conduct, or operate said livery-stable.'

“ ‘Sec. 5. The provisions of this ordinance shall not apply to any livery-stable now being maintained, conducted or operated.

“ ‘Sec. 6. Any person or corporation who shall construct, maintain, conduct, or operate any livery-stable within the corporate limits of the city of Billings in violation of the provisions of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than \$10.00 nor more than \$300.00, and each day such livery-stable ¹⁰³ is so maintained, conducted, or operated shall be deemed a separate and distinct offense.’

“(14) That said defendants began to conduct, operate and maintain their livery-stable business in said livery-stable after the passage, approval, and publication of said ordinance and prior to the twelfth day of April, 1906.

“(15) In addition to the livery-stable operated and maintained by said defendants there are three other livery-stables in said city, two of which are in residence districts of said city, but which were in operation long before the passage of said ordinance.

“(16) That said livery-stable of defendants on said lots has always been, since its construction, kept in good, orderly and clean condition, at least equal to any other livery-stable in said city, and far superior to some.”

As the ultimate question to be decided here is whether the conviction of the defendants shall be affirmed or set aside, we only deem it necessary to pass upon the one point which seems to us particularly decisive of that question. That point is squarely presented by the appellants in their brief, as follows: “The ordinance in question is an unlawful discrimination between appellants and other proprietors of livery-stables in the city of Billings.”

It will be observed that the defendants were not prosecuted for "constructing" a livery-stable, but for maintaining, conducting and operating one. Let us, then, for the purpose of analyzing the question, eliminate the word "construct" from sections 1, 2, and 6 of the ordinance. Section 1 would then require any person desiring to maintain, conduct, or operate a livery-stable within certain residence portions of the city of Billings, to first obtain a permit from the city council, and section 2 would provide that any person desiring to maintain, conduct, and operate a livery-stable, as aforesaid, must first file his written application therefor and the consent in writing of a majority of the ¹⁰⁴ lot owners of the block in which he desires to maintain, conduct, and operate said stable. Section 6 would read: "Any person who shall maintain, conduct or operate any livery-stable in violation of the provisions of this ordinance shall be deemed guilty of a misdemeanor." Section 5 provides that the provisions of the ordinance shall not apply to any livery-stable that was being maintained, conducted, or operated at the time of the passage of the ordinance, and the record discloses the fact that there were three livery-stables to which the exception would apply.

It seems that defendants were allowed to practically complete their stable, and were then prosecuted for operating it. The effect of the ordinance is that the first three stables, two of which were in the residence district, could continue to operate, but the defendants could not operate at all. The legislature, by paragraph 42 of section 4800 of the Political Code, as amended by an act of the fifth legislative assembly, approved March 8, 1897 (Laws 1897, p. 203), gave to city councils the express authority to regulate the location of livery-stables.

In the case of *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833, this court reviewed the decisions of the supreme court of the United States construing that portion of the fourteenth amendment to the constitution of the United States, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws." The opinion of Mr. Justice Field in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, is there quoted, in which he says: "Equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; all persons should be equally entitled to

enjoy property; no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

¹⁰⁵ In the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220, also there cited by this court, it was said that "the equal protection of the laws is a pledge of the protection of equal laws."

"Not only must the law as enacted furnish equal protection to all, but also, the legislature, in enacting any law, must so adjust its provisions that it will operate equally upon the individuals constituting the class of citizens whose conduct it is intended to control": *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833.

The case of *Mayor etc. of Hudson v. Thorne*, 7 Paige (N. Y.), 261, was an action in equity to restrain the erection of a hay press building on a certain city lot. The city council had passed an ordinance by which, among other things, it was ordered that no person should erect or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay press, within certain specified limits of the city of Hudson, of more than thirty feet in width and thirty feet in depth, without the permission of the common council. The chancellor said: "It appears there were such buildings already in existence, not only within other compact parts of the city, but also within the prohibited limits, the occupation of which, for storing and pressing hay, the common council did not intend to restrain. If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power to prevent the carrying on of such manufacture, but, as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business. Neither have they the right to permit the dangerous manufacture to be carried on in buildings already erected, and to prohibit these defendants, whose building was destroyed by an incendiary, from rebuilding the same for the purpose of carrying on a manufacture which is permitted to others": See, also, *Cooley's Constitutional Limitations*, p. 282.

¹⁰⁶ "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation": 1 Dillon on Municipal Corporations, 4th ed., sec. 322.

In the case of *Tugman v. City of Chicago*, 78 Ill. 405, the court said: "It will be observed that the regulation, to enforce which this suit was instituted, prohibits the use and operating of slaughter-houses which should be erected after the first day of January, 1872, while those that were erected prior to that time are left perfectly free to be operated as the owners thereof may desire. If the health or comfort of the city required the prohibition of new slaughter-houses within a designated part of the city, the same reason would surely demand that old ones should be discontinued. If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and, for that reason, void, but its direct tendency would be to create a monopoly, which the law will not permit. The fact that certain persons were engaged in the business within the district designated in the ordinance at the time of its adoption gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later period. If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been ¹⁰⁷ commenced. A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation": See, also, *City of Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196.

The case of *Town of Crowley v. West*, 52 La. Ann. 526, 78 Am. St. Rep. 355, 27 South. 53, 47 L. R. A. 652, was a case very similar to this one. The defendant was fined for vio-

lating an ordinance of the town of Crowley which prohibited the establishment of livery-stables, except within certain limits. The ordinance was as follows:

“Section 1. That hereafter it shall be unlawful to establish, maintain, locate or operate a livery, feed, sale, and boarding stable within any portion of the corporate limits of the town of Crowley, except as hereinafter provided.”

“Sec. 3. That the provisions of this ordinance shall not be applied to livery, sale, boarding, and feed stables, already in existence and under operation.”

The court said: “We have, then, a case in which it appears that a person, engaged in a business which is conceded to be lawful, in which four other persons, or firms, are engaged, in the same town, which, so far as the record discloses, is conducted properly and inoffensively, is nevertheless, by the operation of a municipal ordinance, arrested and fined, because he has failed to establish his said business in a part of the town remote from the business center, rather than at the place which he considers most advantageous, and it further appears that the other four persons or firms engaged in the same business are not to be affected by the ordinance, but are to be permitted to conduct their business where they please, and that it naturally pleases them to remain in the central part of the town, from which the defendant is to be permanently excluded. The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly, in perpetuity, of the livery-stable business in Crowley, cannot be seriously entertained.”

We conclude, therefore, that, both upon reason and the decided cases, the ordinance we have had under consideration was ¹⁰⁸ inoperative and void as to these defendants. It is therefore ordered that the judgment of the district court be reversed, and the cause is remanded, with directions to that court to dismiss the action and enter judgment for the defendants in accordance with the stipulation in the agreed statement of facts.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

A Municipal Ordinance which permits certain livery-stables to be maintained in the business center of the city, while another stable and all others thereafter erected are confined to a designated locality remote from the business center, is held void in *Crowley v. West*, 52 La. Ann. 527, 78 Am. St. Rep. 355. As to the power of a city to regulate the location of dairies and cow-stables, see *St. Louis v. Fisher*, 167 Mo. 654, 99 Am. St. Rep. 614.

PEW v. JOHNSON.

[35 Mont. 173, 88 Pac. 770.]

APPEAL—Disposition of Equity Cases.—Under a statute authorizing and requiring the supreme court in equity cases to review all questions of fact arising upon the evidence and determine them, as well as all questions of law, the court may, in a case wherein the title to a water right is sought to be quieted and defendant enjoined from further interference therewith, pass without examination the alleged errors, and dispose of the appeal upon its merits under an examination of the evidence alone. (p. 855.)

WATER RIGHTS—Adverse User.—If one person and his predecessors have used the water of a stream for forty years adversely to the alleged rights of another and his grantor, the former gains an indefeasible title to such use. (p. 857.)

WATER RIGHTS—Conveyances—Effect.—If the father of the plaintiff's grantor merely permitted his son to use certain water rights for the irrigation of the land conveyed to plaintiff, the conveyance does not carry a grant to plaintiff of the right to use such water, as an appurtenance to the land. (p. 857.)

EVIDENCE—Testimony of Witness Since Deceased—Stenographic Notes—Identification of.—If the stenographer who took the testimony of a witness since deceased is also dead at the time that such testimony is sought to be used, and no one can be found who can read his notes or speak as to the correctness of them, or of the transcript thereof, or to the fact that such transcript embodied the testimony of the witness as given at the former hearing, such testimony is not properly identified and is not admissible in evidence. (p. 857.)

JUDGMENTS—Res Judicata.—A person, though not technically a party to a prior judgment, may nevertheless have been so connected with it by his interest in the result of the litigation, and his active participation therein, as to be bound by such judgment. (p. 857.)

C. B. Nolan and C. E. Pew, for the appellant.

E. A. Carleton, for the respondent.

¹⁷⁵ **BRANTLY, C. J.** This action was brought to determine, as between the plaintiff and defendant, the right to the use of the waters of Silver creek, in Lewis and Clark county.

Plaintiff claims the right to the exclusive use of one hundred and sixty-seven and one-half inches, statutory measurement, as the successor in interest of one Austin and one Dale, who, in 1865, settled upon adjoining portions of section 29, township 11 north of range 3 west, which is traversed by said stream, and on May 25th of that year made a joint appropriation of water therefrom ¹⁷⁶ and established their right by constructing a joint ditch, thereby conveying the waters to their respective premises. At the date of these settlements none of the lands in that neighborhood had been surveyed, and Austin and Dale staked their claims expecting to make the boundaries conform to the lines of the survey when it should be made. The survey was made in 1868 or 1869. Three or four other claims were taken up along the stream during the same year. Austin was highest up the stream. Dale was next below him. Adjoining Dale below, Austin staked a claim for one Bean. Next came one Harold who "took up" a claim in the winter of 1895.

The evidence is somewhat vague and indefinite as to what portion of these lands is now owned by defendant, for it does not distinctly show to what extent the boundaries as first fixed by the respective claimants were changed at the time the survey was made. It is clear, however, that the defendant owns a portion of the Bean and Harold lands as they were originally staked, and, possibly, a part of the Dale lands. Next below these claims one Bartlett made a settlement in 1865. The title to all of these lands afterward passed by patent from the United States to the successors of these original settlers. At present the plaintiff is the owner of the southeast quarter of section 30, and of the south half of the northwest quarter of section 29, none of these having been included in the Austin or Dale settlements. The latter subdivision was acquired by the predecessors of plaintiff by deed from the Northern Pacific Railroad Company.

In his complaint plaintiff claims eighty inches of the Austin and Dale appropriation by mesne conveyances to him of the lands last mentioned, with appurtenances, through one J. R. Johnson, and the remaining eighty-seven and one-half inches by mesne conveyance of a half interest in the water right through one Kleinschmidt, who bought it from Johnson in 1884, to be used on lands other than any of those mentioned, belonging to Kleinschmidt. He alleges that the defendant has for the past two years wrongfully and without right of title,

but under a claim of right thereto, been diverting these waters to his irreparable ¹⁷⁷ damage, and asks that his title be quieted and that defendant be enjoined from further interference with them.

The defendant in his answer puts in issue most of the material allegations of the complaint. He admits, however, that the Austin and Dale appropriation was made in 1865 as alleged, but denies that it ever consisted of more than fifty inches. He avers that it was made, to the extent of one-half of it, for the use and benefit of the lands now owned by the defendant, to wit, the southeast quarter of section 29, the same being part of the lands therein owned and possessed by said Austin and Dale. He pleads and relies upon three several judgments rendered by the district court of Lewis and Clark county, adjudicating the relative extent and priorities of the rights of the parties thereto, to the use of the waters of Silver creek, some of whom are alleged to have been predecessors, respectively, of the plaintiff and defendant, as prior adjudications of the rights here involved, and a complete estoppel of the claim now made by the plaintiff. He further avers that he has never at any time used more than one-half of the Austin and Dale right, but that he has been using it to that extent and intends to continue to do so, since he is the owner of the right to that extent. He alleges that he and his grantors and predecessors in interest have, for a period of forty years last past, and in derogation of the alleged exclusive right of plaintiff and his grantors, openly, notoriously, continuously and adversely to the plaintiff and his grantors, used one-half of the Austin and Dale right upon the lands now owned by him. Upon these allegations there was issue by reply.

It will be noticed that the only issue presented by the pleadings is as to the right to the beneficial use by defendants of twenty-five inches of the Austin and Dale appropriation. The court found this issue for the defendants, and thereupon entered judgment dismissing the action. This appeal is from the judgment and an order denying plaintiff's motion for a new trial.

The court found, in substance, that the judgments referred to are *res adjudicata* as to plaintiff's alleged cause of action; that the waters appropriated through the Austin and Dale ditch were ¹⁷⁸ intended for use on a portion of the lands now owned by defendant; that no part of them was ever ap-

purtenant to the lands now owned by the plaintiff; that Kleinschmidt had no interest therein which he could convey to plaintiff; and that, even if the predecessors of plaintiff ever owned the exclusive right therein, the defendant and his predecessors had been using them adversely to plaintiff's alleged right for more than forty years, and hence defendant has an indefeasible title thereto.

Contention is made that the court erred in permitting to be introduced in evidence the judgments referred to, for the reason that neither the plaintiff nor any of his predecessors were parties to them, and for the further reason that the right here involved was not in issue in any of the causes wherein they were rendered. Contention is also made that the court erred in permitting to be introduced in evidence, over objection of defendant, a transcript of the stenographic notes of the testimony of one W. H. Ewing, deceased, given in the case of Butler and Mynderse v. S. S. Johnson, one of the causes above referred to, for the reason that the controversy therein involved was not an action between the same parties relating to the same matter.

It is further contended that the findings of the court are not supported by the evidence, and that they in turn do not support the judgment. Since the statute (Code Civ. Proc., sec. 21, as amended by act of 1903 [Sess. Laws 1903, 2d Extra. Sess., p. 7]), authorizes and requires this court in equity cases to review all questions of fact arising upon the evidence and determine the same, as well as questions of law, and since the merits of this case can readily be determined without the solution of the questions presented by the contentions of counsel, we forego an examination of any of them. Conceding that all the contentions made should be sustained, yet, upon the evidence, we think the result reached by the district court was correct.

As stated above, the evidence as to the boundaries of the original claims staked by Austin, Dale, Bean and Harold is vague and indefinite; yet it does lend support to the conclusion that a part of the Dale land is now included in that owned by the defendant. ¹⁷⁹ In any event, it shows almost conclusively that the defendant owns what were originally the Bean and Harold claims. It further shows that the plaintiff obtained his land from the patentee of the Austin lands. Each party is therefore entitled to claim the waters in ques-

tion, but to the extent only that the Austin and Dale appropriation is shown to have been appurtenant to his lands, or to which he has become vested with the right by a specific conveyance; for both claim under this right and no other.

The facts in connection with this appropriation are these: Austin and Dale, soon after their settlement in 1865, took out a common ditch from Silver creek and conveyed water therein to their lands to irrigate their vegetable gardens and small areas sown in grain. In neither case was a greater area than six or eight acres cultivated. It seems that no part of the Bean land was cultivated that year; but the ditch, which was finished about June 1st, extended to the east line of the Dale place. The next spring Harold and one or two other settlers to the east and below joined with Austin and Dale in changing the point of diversion farther up the creek. They enlarged the ditch and extended it through the Bean and Harold claims down to the Bartlett claim. Thereafter, by amicable arrangement, the successors in interest of Harold and Bean, the predecessors of defendant, and the defendant used the waters so diverted to the extent of twenty-five inches in the cultivation of their land. At no time, except in the various actions hereinbefore referred to, was this right questioned; and in the latter two of them the twenty-five inches were awarded to defendant. Indeed, J. R. Johnson, who without doubt acquired the principal part of the Austin and Dale lands by patent, and through whom the plaintiff claims his right, lived up to this arrangement, he and the defendant and his predecessors each claiming to be the owner of a half interest. When the water was plentiful, each took what he needed; when it was scarce, they used it alternately. So that, conceding that the conveyance of the half interest by J. R. Johnson to Kleinschmidt, and by him to the plaintiff, was valid and sufficient to ¹⁸⁰ convey that interest, still, looking to the original appropriation, the method by which defendant's grantors acquired their interest and the manner of its use during forty years, the defendant is entitled to the use he claims; and since the evidence further shows that he has not transcended his claim in the amount used, he is not shown to have infringed upon the rights of plaintiff, and plaintiff's action was therefore properly adjudged to be without foundation.

Further, it does not appear that J. R. Johnson ever questioned the right of defendant, even after the conveyance by

him to Kleinschmidt of the half-interest. By that conveyance, which was in fact an exchange of rights, he obtained from Kleinschmidt ostensibly an interest in waters from other sources which he thereafter used upon his place.

From another point of view the plaintiff cannot recover. David Johnson, the grantor of plaintiff of the lands now owned by him, was the son of J. R. Johnson. The lands of the latter were immediately to the east and south of David Johnson's land. The son obtained his land from his father. The remaining lands of J. R. Johnson were conveyed by him to other parties, not interested here. As long as David Johnson held his land, any use of water made by him thereon was by permission of his father; and though the Austin and Dale appropriation may have been used by him, such use of it could not and did not make it appurtenant to any of this land. So that the plaintiff, the grantee of David Johnson, could obtain no better title to the use of it as an appurtenance to David Johnson's land than had Johnson himself. Therefore, from either point of view, the district court reached the correct result.

We have not so far considered the deposition of Ewing to which objection was made. This should have been excluded, because it was not properly identified. The stenographer who made the transcript of it was dead; and since it appeared that no one could be found to read his stenographic notes or to speak as to the correctness of them, or of the transcript, or to the fact that the transcript embodied the testimony of the witness as ¹⁸¹ given at the former hearing, it was not brought within the rule of the statute authorizing its use: Code Civ. Proc., sec. 3146; Reynolds v. Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

In conceding, for the purpose of this case, the correctness of the contention made by counsel for appellant that the judgment-rolls were improperly admitted, we do not wish to be understood as expressing any opinion thereon, further than to say that we are inclined to think that, while the plaintiff was not technically a party to any one of the cases in which those judgments were rendered, he was nevertheless so connected with them by his interest in the result of the litigation and his active participation therein, that he is bound by them. From this point of view, the judgment of the district court would be justified upon the consideration of those judgments

alone, without reference to the other evidence, which abundantly supports its conclusion.

The judgment and order are affirmed.

Mr. Justice Holloway and Mr. Justice Smith concur.

As to Stenographer's Notes as Evidence, see the note to *Pladgitt v. Moll*, 81 Am. St. Rep. 358.

Judgments are Conclusive upon the parties to the action and their privies (*Schuler v. Ford*, 10 Idaho, 739, 109 Am. St. Rep. 233; *Chicago etc. R. R. Co. v. Cass County*, 72 Neb. 489, 117 Am. St. Rep. 806), but upon them only: *Larsen v. Gasberg*, 30 Utah, 470, 116 Am. St. Rep. 859. The term "parties" includes those who are directly interested in the subject matter of the suit, knew of its pendency, and had the right to control and direct or defend it: *Courtney v. William Knable etc. Co.*, 97 Md. 499, 99 Am. St. Rep. 456. But see *Cope v. Payne*, 111 Tenn. 128, 102 Am. St. Rep. 746.

BRANDE v. BABCOCK HARDWARE COMPANY.

[35 Mont. 256, 88 Pac. 949.]

CHATTEL MORTGAGES—Removal of Grain—Bona Fide Purchaser.—If mortgaged grain has been removed from the land of the mortgagor, it is prima facie free from encumbrance, and the mere fact that a buyer of it has knowledge that it was once mortgaged is not alone sufficient to prevent his being a bona fide purchaser. (p. 861.)

CHATTEL MORTGAGES—Removal of Grain—Bona Fide Purchaser—Estoppel.—If mortgaged grain has been removed from the land of the mortgagor, a buyer of it has a right to presume that the mortgage lien has been extinguished, and unless he has in some way estopped himself to deny the continued existence of such lien, he may safely buy as an innocent purchaser. (p. 862.)

CHATTEL MORTGAGES—Waiver of Lien.—If an agent of the mortgagee takes a mortgage on a crop of grain in his own name for the benefit of his principal, and agrees with a third person, furnishing the seed, that he may purchase the crop at an agreed price and pay him the balance due after deducting the cost of the seed, such agent, if he does not waive the mortgage lien altogether, at least sells it for such third person's promise to pay the balance of the purchase price to him. (p. 862.)

COSTS—Memorandum of—Burden of Proof.—A memorandum of items of costs, duly verified, served on the opposite party and duly filed, is prima facie evidence that the items were properly expended and therefore taxable, unless, as matter of law, they appear otherwise upon the face and the burden of proving that such items were not properly taxable is upon the other party. (p. 863.)

F. H. Hathborn and H. A. Grooves, for the appellant.

W. M. Johnston, for the respondent.

²⁵⁸ SMITH, J. This action was begun to recover the sum of five hundred and four dollars, the alleged value of certain wheat sold by one Farr to the defendant company, upon which plaintiff held a chattel mortgage, of which defendant is alleged to have notice. At the close of the testimony the court directed the jury to return a verdict for the ²⁵⁹ defendant, and upon such verdict judgment was entered. From that judgment the plaintiff has appealed to this court.

It appears that on the twenty-ninth day of December, 1903, Farr made, executed and delivered to plaintiff his promissory note, and on the same day, to secure the note, made his chattel mortgage upon the crop to be raised by him in the following year, 1904. This note and mortgage were taken by Austin North, the agent of plaintiff. The plaintiff nowhere appears personally in the action. In the spring of 1904 Farr went to the respondent company to buy seed wheat on credit, which was refused him; but he finally obtained the same by giving a note therefor and signing a contract to sell the crop raised from said seed to the Babcock company. The form of contract was as follows:

“This agreement, made and entered into this — A. D. —, by and between the A. L. Babcock Hardware Company of Billings, Montana, a corporation, the party of the first part herein, and —, party of the second part, witnesseth: That the parties of the first and second parts have this day mutually agreed and covenanted, and do by these presents bind themselves in the manner following; that is to say:

“First. For and in consideration of the covenants and agreements hereinafter contained to be kept and performed by the said party of the second part, the said party of the first part hereby agrees to sell and deliver — to the said party of the second part on demand — pounds of No. One hard seed wheat, or so much thereof as may be desired by the said party of the second part, at the rate of — per hundred weight.

“Second. Said party of the second part hereby agrees to sow, cultivate, irrigate, harvest and thresh in a good and farmer-like manner all and singular the hard wheat so to be furnished him as above; and after the said wheat shall have been harvested and threshed as aforesaid, to sell and deliver the

same and all thereof so harvested and threshed to the said party of the first part, to be paid for by the said party of the first part at the rate of ——— per hundred weight, f. o. b. cars ———.

200 "Third. The said party of the first part hereby agrees to pay to the said party of the second part the sum of ——— per hundred weight for all hard wheat, cultivated, irrigated, harvested and threshed on the premises of the said party of the second part, and which may be delivered f. o. b. cars to the said party of the first part in good condition at any time during the months of ———, A. D. 190—.

"In witness whereof, the said party of the first part has hereunto caused its corporate name and seal to be affixed by its proper officers on this ———, A. D. 190—, and the said party of the second part has hereunto fixed his hand and seal at ———, this ——— day of ———, A. D. 190—."

The contract was filled in with Farr's name as party of the second part, the number of pounds of seed wheat delivered to him, and the price per hundred (one dollar and fifteen cents) that was to be paid for the crop in the fall. One Connolly signed for the company, and North attached his signature after Farr's, either as a party, or as a witness. North also indorsed the note for the seed wheat. He testified: "I was anxious to see the fellow get a crop, and I signed the note personally so that he could get the seed wheat at that time. In my presence, Mr. Connolly agreed to purchase the wheat, and agreed upon the price he would pay for the wheat; that is, the price to be allowed Mr. Farr, and to be paid to me after deducting the amount of the note. . . . If I signed the contract for the sale of the wheat, I did it as the agent of the mortgagee." He says that in indorsing the note he did not intend to waive the lien of the mortgage.

At the time of this transaction Connolly was the secretary of the defendant company, acting in the course of his employment, and had knowledge of appellant's mortgage. He says that to induce North to indorse the note, he told him that he (North) had a mortgage, and he took no chances in indorsing the note. Connolly ceased to represent the defendant company in August, 1904.

201 On September 30, 1904, Farr removed the wheat from the land on which it was grown, sold it to defendant company, and received the balance of the money, after deducting the amount of the seed wheat note. The respondent's miller re-

ceived the wheat for the company, and none of the then officers or employes of the Babcock company had any knowledge of the chattel mortgage. Connolly left with the company no note or memorandum of his agreement with North. Mr. Foster, the secretary of the Babcock company, testified as follows: "In the first place, when the wheat is received at the mill it is bought by the miller or some person, and duplicate tickets are made out, one of which is given to the man who hauls the wheat in, and the other one is put on file and turned in, taken in to the office; and when the party comes in to settle, the first thing to do is to look at the wheat book, and then we look to see whether he has contracts or not, and if he has, we settle according to that contract. If the contract calls for a specific price named in the contract, we pay that; otherwise we pay him the market price of that day; and, of course, we examine our ledgers and books to see what, if anything, these parties owe us, and of course that is deducted, and a statement is made out to him showing the amount of wheat received and the price of it, and everything that is deducted, and he is given a check for the balance."

We think the district court was right in directing a verdict for the defendant.

Section 3876 of the Civil Code is as follows: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor." This section is the same as section 2972 of the California Civil Code, as amended in 1878; and in the case of *Horgan v. Zanetta*, 107 Cal. 27, 40 Pac. 22, the supreme court of California said: "The crop had been removed from the land of the mortgagor at the time the attachments and executions ²⁶² were levied on it by the [defendant]; therefore, the lien of the mortgage had prima facie been extinguished. It therefore devolved upon [plaintiff] to remove this prima facie case by showing that the case at bar is an exception to the general rule. . . . It is true that when Cole attached he knew that there had been a mortgage on the crop; but he also knew that the lien had been extinguished by the removal of the crop from the land of the mortgagor, and he was not bound to look after the former rights of the mortgagee who had lost them by his own carelessness."

We think this decision is correct in principle, and there is nothing to be gained by the examination of other cases. Sec-

tion 3876 was undoubtedly enacted to facilitate the business of dealing in grain. The mortgagee is protected by the provision that the lien shall continue after severance; but the moment he allows the grain to be taken from the land where it was grown, he, by such act, removes the principal means of identifying the same, and the property is *prima facie* free of encumbrance. If this were not so, no buyer would be safe in purchasing a load of wheat, because it would be next to impossible for him to learn where every bushel offered for sale was grown, and whether there had ever been a chattel mortgage on it.

We hold that where grain has been removed from the land of the mortgagor, the mere fact that the buyer had knowledge that it was once mortgaged is not alone sufficient to prevent his being a bona fide purchaser. He has a right to presume that the lien has been extinguished, and unless he has in some way estopped himself to deny the continued existence of the mortgage lien, he may safely purchase. In addition to this, it seems to us that, when North, as plaintiff's agent, agreed that the Babcock company might buy this wheat, under North's own version of the transaction, if he did not waive the mortgage lien altogether, he at least bartered it for Connolly's promise to pay the balance of the purchase price over to him. We do not see how his principal can sue in conversion.

²⁶³ On April 23, 1906, defendant filed its memorandum of costs and disbursements in the case, as follows:

"Witness" Name.	Per Diem.	Mileage.	Total.
A. B. Renwick.....	\$9 00	\$9 00
W. C. Renwick.....	9 00	9 00
F. B. Connolly.....	9 00	9 00
Fred H. Foster.....	9 00	9 00
Subpoenas	3 40		

Total sheriff's fees, \$3 40''

Plaintiff thereupon moved the trial court to strike from said memorandum the per diem fees of A. B. Renwick, W. C. Renwick, Connolly and Foster, for the reason that it does not appear therefrom upon what days said witnesses were in attendance upon the court. He also moved to strike out the item of three dollars and forty cents, for the reason that it does not appear how many subpoenas were served, where they were served, nor upon whom they were served. The court denied

said motions, and plaintiff preserved the point by a bill of exceptions. He urges it for consideration here.

An inspection of this bill of costs shows that the defendant's witnesses claimed no mileage, but only for three days' attendance each. The record here shows that the trial began, verdict was returned and judgment rendered, all on the same day, April 23, 1906. In the case of *King v. Allen*, 29 Mont. 5, 73 Pac. 1107, Mr. Chief Justice Brantly, speaking for this court, said: "The rule is well established by the authorities that where, under a statute or rule of court, a requirement is made that, in order to recover costs, the party claiming them must, within a specified time, serve upon his adversary and file with the clerk a memorandum of the items thereof, duly verified, such memorandum is prima facie evidence that the items were necessarily expended, and are properly taxable, unless, as a matter of law, they appear otherwise upon the face. The burden of overcoming this prima facie case rests upon the adverse party, ²⁶⁴ and the party filing the memorandum is required to furnish further proof only in rebuttal. Hence upon the trial of a motion to tax costs, if the adverse party does not overturn the prima facie case made by the verified memorandum, the objection should be overruled."

Under section 1866 of the Code of Civil Procedure, the items complained of could be taxed, and it devolved upon the plaintiff to show that they were not properly taxed. This he did not attempt to do. He argues, however, that the rule laid down in *King v. Allen*, 29 Mont. 5, 73 Pac. 1107, should not be applied where the charges do not appear on their face to be proper and necessary; but that in such cases the burden should be on the claimant, and not on the moving party, and if he fails to introduce evidence to justify and sustain his charges, they should be stricken out on motion. To accept this contention of the appellant would be to reverse the rule already adopted. As a matter of law, these items appear to be properly taxable; therefore, the burden of showing that they are not so was upon the appellant.

The judgment of the district court of Yellowstone county is affirmed.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

A Purchaser of Grain from the Mortgagor thereof is not protected as an innocent purchaser by the mere fact that the mortgagee allowed the mortgagor to thresh and sell the grain, when the purchaser

had constructive notice, by the record, of the existence of the mortgage: *Endreson v. Larson*, 101 Minn. 417, 118 Am. St. Rep. 631. See, further, the note to *Gillilan v. Kendall*, 18 Am. St. Rep. 770, on the continuance of the lien of a chattel mortgage on crops after their severance and removal from the land. As to the loss of the lien of a chattel mortgage by removing the goods from the state, see *Jones v. North Pacific Fish etc. Co.*, 42 Wash. 332, 114 Am. St. Rep. 131.

GEHLERT v. QUINN.

[35 Mont. 451, 90 Pac. 168.]

ACTIONS—Splitting Cause of.—If an officer has disposed of a portion of personal property alleged to have been wrongfully seized by him under a writ of attachment, the owner may maintain an action in trover and conversion for the goods thus disposed of, and an action in replevin for the remainder. (p. 866.)

TROVER AND CONVERSION—Bill of Sale as Evidence.—If, in an action in trover and conversion, one of the questions at issue is the bona fide transfer of the property before attachment, evidence of the record of a bill of sale of such property is properly admissible, though it is not required to be recorded, as showing what the parties actually did and the manner in which they did it. (p. 866.)

EVIDENCE—Exclusion of—Harmless Error.—Although the question of the relations existing, whether friendly or otherwise, between certain parties is pertinent to the issue on trial, the refusal of the trial court to permit an inquiry into such relations is not prejudicial, when during the trial the information sought has been called to the attention of the jury and the excepting counsel has failed to make a specific and comprehensive offer of proof. (p. 867.)

APPEAL—Objectional Remark of Court.—If the record fails to show that counsel objected or excepted to an objectionable remark of the trial court, an assignment of error thereon cannot be reviewed on appeal. (p. 867.)

TRIAL—Amendment of Pleadings—Discretion of Court.—The allowance of an amendment to the pleadings is within the sound legal discretion of the trial court. (p. 867.)

EVIDENCE—Presumption—Dating of Summons.—It is presumed that the clerk of a court did his duty and properly dated a summons, but such presumption is disputable. (p. 868.)

FRAUD—Degree of Proof—Instructions.—An instruction that fraud is never presumed, but must be clearly and distinctly proved, is erroneous, as requiring something more than a bare preponderance of the evidence to prove it, and therefore imposing too great a burden on the party alleging it. (p. 868.)

McBride & McBride, J. F. Davies and J. G. Brown, for the appellants.

J. H. Baldwin, for the respondent.

⁴⁵³ SMITH, J. This is an action in conversion to recover of Quinn, a sheriff, and his official sureties, damages for the alleged wrongful seizure of the stock and fixtures in a certain meat market in Butte. Plaintiff alleges that the property taken was of the value of fifteen hundred dollars, and that the entire damages suffered by him are eighteen hundred dollars.

⁴⁵⁴ The defendants answered that the property was taken by virtue of a writ of attachment against one Fay, and that plaintiff was neither the owner nor in possession thereof at the time of taking. As an affirmative defense the defendants allege that before the commencement of this case the plaintiff had split his cause of action by beginning an action in claim and delivery before a justice of the peace for one horse, wagon and harness, which property was a part of that taken by the sheriff under his writ at the same time and as a part of the same act or transaction complained of by the plaintiff. The allegation is that Gehlert had judgment before said justice of the peace, and an appeal was had to, and is now pending in, the district court.

By way of reply the plaintiff set forth that the writ of attachment under which justification was attempted was void, because it was issued prior to the issuance of the summons in the case against Fay; it having been issued on November 2, 1905, and the summons on the following day. Plaintiff also denies that he has split his cause of action, and denies that the horse, wagon and harness were taken with the property mentioned in the complaint or as a part of the same transaction.

The cause was tried before the district court of Silver Bow county, sitting with a jury. A general verdict of fifteen hundred dollars in favor of the plaintiff was rendered, and in answer to a special question the jury found the actual market value of the property taken to be nine hundred and fifty-seven dollars. From a judgment on the general verdict, and an order denying a new trial of the issues, the defendants have appealed to this court.

The first error assigned is based upon the refusal of the court to direct a verdict for the defendants, for the reason that the new matter in the answer was not put in issue by the reply. We have been somewhat at a loss to follow the idea attempted to be conveyed by this reply, especially in view of the fact that the sheriff's return to the writ of attachment

shows that the horse, wagon and harness were taken from him in an action brought, not by the plaintiff, but by Fay. However, we do find therein a denial that the property was all taken at the same time and ⁴⁵⁵ as a part of the same transaction. But the evidence leaves no question that the plaintiff has split his cause of action, so that it becomes necessary to inquire whether he had the right to do so.

It appears that, prior to filing complaint in the justice of the peace court against him, the sheriff had disposed of the greater part of the property described in the complaint in this cause. In the case of *Huffman v. Knight*, 36 Or. 581, 60 Pac. 207, the supreme court of Oregon said: "It would be protecting a trespasser, to the injury of the owner, to hold that a person whose property is wrongfully taken by a single trespass cannot maintain an action in replevin, so far as it is the proper and appropriate remedy, for so much of the property as can be included in the action, and trover for the remainder. Otherwise, he would be compelled to waive his right to the possession of the specific property wrongfully and unlawfully taken from him, and which might possess some peculiar and unusual value, and resort to the action of trover, because replevin would not lie for a portion of the property taken at the same time, or to forego a part of his right, and be satisfied with a partial reparation of the wrong." We think this is the correct rule of law, supported by both reason and authority.

On the trial the plaintiff produced the deputy clerk and recorder as a witness, and proved by him, over the objection of the defendants, that a certain bill of sale from Fay to the plaintiff, purporting to transfer the property in question on November 1st, had been filed for record and bore the indorsement of the county clerk as having been filed November 1, 1905, at twelve minutes past 2 o'clock P. M. We find no error in this action of the court, even assuming that the law does not provide for filing such a document. One of the questions at issue was whether Fay had made a bona fide transfer of this property to plaintiff before the date of attachment, and evidence of what they actually did, and the manner in which they did it, was admissible as bearing upon their good faith in the transaction. The question of notice is not involved, so that it becomes immaterial ⁴⁵⁶ whether the instrument was properly filed or not. The amount of publicity attempted to be given the purported sale was a mate-

rial subject of inquiry, and the filing of the bill of sale in a public office sheds some light upon the matter.

Defendants complain that they were not allowed to inquire of the plaintiff as to the capacity in which he worked for Fay prior to the alleged sale, and of the witness Bechard as to whether the relations of plaintiff and Fay appeared to be friendly or otherwise. These inquiries were pertinent; but the record shows that the jury were informed, during the course of the trial, as to what the general relations of the parties were and what plaintiff's employment was, and we find no prejudicial error in the rulings, in the absence of a specific and more comprehensive offer of proof.

In ruling out the question propounded to the witness Bechard, the court remarked that it was a reasonable presumption that, when one man works for another, they are on good terms. It is now urged that this remark was prejudicial to defendants. It may suffice to say, however, that while defendants excepted to the ruling of the court on the question of the admissibility of the evidence sought, there is nothing in the record to show that they objected to or took any exception to the remark of the court.

It is urged that the court was in error in allowing the plaintiff to amend his reply; but we cannot agree with the contention. The allowance of the amendment rested in the sound legal discretion of the trial court, and no showing of prejudice to the defendants was made.

Exceptions were taken at the trial to several rulings of the court upon questions propounded to witnesses as to how much stock had been purchased for the market just prior to the alleged sale. These questions were proper, and objections thereto should have been overruled; but on an examination of the record we find that the jury had the benefit of the testimony of several other witnesses on the same subject, and we do not think the defendants were prejudiced by these rulings.

⁴⁵⁷ Again, it is urged by the defendants' counsel that the testimony shows actual fraud in the transfer from Fay to Gehlert. The jury, however, found the issues in favor of the plaintiff, the trial court denied a new trial, and the testimony is not of such a nature as to warrant this court in setting aside the verdict for that reason.

Under the issues raised by the answer, the defendants attempted to show that, while the summons was dated November 3d, it was in fact issued and delivered to the sheriff with

the writ of attachment on November 2d. While the presumption obtains that the clerk of the court did his duty and properly dated the summons, this presumption is disputable, and the court properly submitted the question to the jury.

The court gave the following instruction to the jury, viz.: "You are instructed that fraud is never presumed, but must be clearly and distinctly proven." Defendants contend that this instruction is erroneous. Subdivision 5 of section 3390 of the Code of Civil Procedure provides that in all proper cases the jury shall be instructed that in civil cases the affirmative of the issue must be proved, and, when the evidence is contradictory, the decision must be made according to the preponderance of the evidence; that in criminal cases guilt must be established beyond a reasonable doubt. Without analyzing the instruction complained of, to the extent of arriving at its exact meaning, we have no hesitancy in holding that it advised the jury that something more than a bare preponderance of testimony was necessary to be produced by the defendants on the question of fraud, and therefore laid too great a burden upon them. There is but one rule in this state by which civil cases triable by jury are to be determined, and that rule is found in the statute just quoted. Cases may be found in which courts of other states have held that in certain civil actions a higher quality of proof is required than in others; but there is no such rule in Montana. In this jurisdiction all such civil cases are to be decided according to the greater weight of the evidence, and a bare preponderance in favor of the party holding the affirmative of the issue ⁴⁵⁸ is sufficient to warrant, and should result in, a decision in his favor. Cases may be found in which it is held that the expressions "clear," "convincing," "satisfactory," and "clear of all reasonable doubt," as applied to evidence, substantially convey the same idea and require the same degree of proof, to wit, beyond a reasonable doubt: See *Winston v. Burnell*, 44 Kan. 367, 21 Am. St. Rep. 289, 24 Pac. 477. It is only necessary to decide here that the expression "clearly and distinctly proven" means something more than proven by a preponderance of the evidence, and to suggest that any attempt to vary the rule laid down by the statute is fraught with danger and should be avoided. Juries should be instructed on all proper occasions, in civil cases, that their decision should be made according to the preponderance of the evidence.

The jury by their verdict awarded general damages in excess of the amount claimed in the complaint, but this will probably not occur again.

The judgment and order of the district court of Silver Bow county are reversed, and the cause is remanded for a new trial.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

A Single and Entire Cause cannot be Subdivided into several claims and separate actions maintained thereon: Reilly v. Sicilian Asphalt Pav. Co., 170 N. Y. 40, 88 Am. St. Rep. 636. A single action only can be maintained for the levy of an attachment upon exempt property, and the refusal to surrender it to the defendant, though some of the articles were of such a character that it was the duty of the officer to deliver them on demand, and as to others he had a right to retain them in his possession for a reasonable length of time to enable him to make an inventory and appraisement, and the defendant to select, claim, and receive in return his exempt portion: Stern v. Riches, 111 Wis. 591, 87 Am. St. Rep. 892. See, too, Thisler v. Miller, 53 Kan. 515, 42 Am. St. Rep. 302; Pierro v. St. Paul etc. Ry Co., 39 Minn. 451, 12 Am. St. Rep. 673. And an action for wrongful attachment cannot be maintained by one who interpleaded in the attachment suit, setting up a claim to and recovering a part of the goods, but not that for which damages are sought: Wheeler Sav. Bank v. Tracey, 141 Mo. 252, 64 Am. St. Rep. 505.

STATE v. SHERMAN.

[35 Mont. 512, 90 Pac. 981.]

CRIMINAL LAW—Confessions as Evidence—Question for Court.—The determination of the question as to whether a confession alleged to have been made by one accused of crime is admissible is for the court alone. (pp. 870, 871.)

CRIMINAL LAW—Confessions as Evidence—Review on Appeal.—The examination of the evidence touching the admissibility of the confession of one accused of crime, and the action of the court thereon, must be conducted in the presence of the jury, to entitle the action of the court to review on appeal. (p. 871.)

CRIMINAL LAW—Confessions as Evidence—Right of Jury.—The jury is not absolutely bound to believe the facts narrated in the confession of one accused of crime and admitted in evidence by the court, but may give them such weight as it deems proper, and in determining the weight to be given to them it may consider all the circumstances under which the confession was made, and the jury must, therefore, hear the evidence touching the making of such confession, although it is addressed primarily to the court. (p. 872.)

CRIMINAL LAW—Confessions as Evidence—Inducements.—A confession of one accused of crime procured by an inducement held out by one in authority is admissible, unless it was procured under

circumstances indicating that the inducement held out to the accused was sufficient to induce a reasonable person, in a like situation to speak regardless of the truth or falsity of his statement, rather than remain silent. (p. 873.)

Wallace & Donnelly and J. C. Huntoon, for the appellant.

A. J. Galen, attorney general, E. M. Hall, assistant attorney general, and O. W. Belden, for the respondent.

517 HOLLOWAY, J. James Sherman was convicted of the crime of murder of the second degree, and appeals from the judgment and from an order denying him a new trial.

During the course of the trial an effort was made by the state to introduce in evidence certain confessions made by the defendant. Upon the request of the defendant the court excused the jury, and heard testimony as to the circumstances under which such confessions were made. While the court seems to have been satisfied that the confessions were admissible, it nevertheless finally submitted the question to the jury, and this, also, would appear to have been done at the instance of the defendant, after he ascertained that the court deemed that such confessions were admissible.

It is claimed by the defendant, first, that the evidence produced before the court, sitting without a jury, shows that the confessions were inadmissible; and, second, that the court erred in instructing the jury as to the test to be applied in determining the admissibility of such confessions. While no exception was taken to the mode of procedure adopted in this instance, a discussion of it is necessary in order to determine whether the court committed either or both of the errors of which complaint is made.

No subject of the law is in more inextricable confusion than that relating to the admission in evidence of confessions made by one accused of crime. The action of the trial court in first hearing testimony relating to the circumstances under which the confessions were made, and then submitting the question of their admissibility to the jury, when it appeared that there was some conflict in the evidence, finds support in numerous authorities: See 12 Cyc. 482, where the cases are cited. But these cases are from states having statutes different from our own, or not having any statutes upon the subject at all.

518 The question whether the confessions were admissible was one relating directly to the competency—that is, the ad-

missibility—of the evidence, and was for the determination of the court alone. Sections 3440 and 3441 of the Code of Civil Procedure provide:

“Sec. 3440. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code.

“Sec. 3441. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.”

These statutes are alike applicable to civil and criminal cases, but appear to have been overlooked, not only in the trial of this case, but also by counsel in preparing their briefs. Under section 3441 above, the jury had nothing whatever to do with determining the admissibility of the confessions. That question the court should have decided, and, in doing so, should have determined the questions of fact surrounding the making of the confessions and applied the law applicable thereto: *Territory v. McClin*, 1 Mont. 394; *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398.

In *State v. Tighe*, 27 Mont. 327, 71 Pac. 3, this court appears to have overlooked the decisions in the *McClin* and *Underwood* cases. While those early cases were decided long before the adoption of our present code and at a time when we had no statute upon the subject now under discussion, they announce the doctrine which has always prevailed in many of the states, even in the absence of statute. While the decision in the *Tighe* case, coming much later, might be considered by some as overruling those early decisions, even though they are not mentioned, still that result cannot be reached when recourse is had to section 3441 above, which states in no uncertain terms the rule ⁵¹⁹ as announced in those early cases. The code establishes the law of this state, which cannot be deemed to be set aside by implication by a decision of this court. We must conclude, therefore, that section 3441 above was overlooked in deciding the *Tighe* case (27 Mont. 327, 71 Pac. 3), and that, in so far as the decision in that case conflicts with section 3441, it is not authority.

We do not mean to say, however, that such examination touching the admissibility of the confessions should have been conducted without the hearing of the jury. The action of the

trial court in passing upon the admissibility of such confessions is subject to review by this court, and, in order that such review may be had, the testimony so taken must be brought here for review, and in order that that may be done, the evidence for review must be evidence taken at the trial of the cause, and under our system we cannot conceive of the actual trial of one accused of a felony proceeding without a jury. We therefore decline to examine the testimony brought here in the transcript which purports to have been taken before the court sitting without a jury.

Furthermore, if, after hearing the evidence, the court decides that the confessions are admissible, the jury are not absolutely bound to believe the facts narrated in the confessions, but may give to them such weight as they deem proper; and, in determining the weight to be given to them, they may consider all the circumstances under which such confessions were made, including the age of the defendant, the fact—if it is a fact—that he was under arrest or detained at the time they were made, the statements, if any, made to him at the time, and, in fact, all the attending circumstances and therefore it is necessary that the jury should hear the evidence touching the making of such confessions, although it is addressed primarily to the court.

Under this view of the case the trial court properly refused to give defendant's requested instruction No. 2, and, for the same reason, erred in submitting to the jury the question of the admissibility in evidence of the confessions of the defendant.

⁵²⁰ It is apparent, however, from the record of this case that the trial court entertained the view that, in order for such confessions to be inadmissible, they must have been procured by inducements held out to the defendant by some one in authority; and while this view finds support in the decisions of some courts, it does not appear to be supported by the weight of the authorities, nor by the better reasoning as it appears to us.

The only reason for excluding a confession in any event is, that the circumstances under which it was made disclose that the confession was prompted by some inducement—whether of hope or fear—sufficient to induce a reasonable person, under the circumstances of the confessing party, to make such confession without regard to its truth or falsity. In other words, if the circumstances are such as that the prospect of better-

ing his situation by speaking even falsely would appeal to the confessing party, as a reasonable person, as the better alternative to remaining quiet, then the confession ought not to be received; and it is, therefore, immaterial whether the confession was actually made in response to inducements held out by an officer or by some third person in the presence of the officer; for any reasonable person would naturally presume that an inducement held out in the presence of an officer, and not repudiated by him, received such officer's sanction or approval.

While we do not approve of all that is said in *Territory v. McClin*, 1 Mont. 394, or in *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398, we do agree with the result reached in each case, and with the limitations which we have suggested, agree with the following portion of the opinion taken from the *McClin* case: "In regard to the person by whom the inducements were offered, it is very clear that, if they were offered by the prosecutor, or by an officer having the prisoner in custody, or by a magistrate, or, indeed by one having authority over him or over the prosecution itself, or by a private person in the presence of one in authority, the confession will not be deemed voluntary and will be rejected."

521 Under this view of the case the testimony of the father of the defendant, as to certain statements made by him to the defendant in the presence of the officers, which statements, it is contended, operated as an inducement to the defendant to make the confessions, should have been considered by the court in determining whether the confessions were induced under such circumstances as would exclude them; and, if then the confessions were admitted, such statements might be considered by the jury along with other testimony in determining the weight to be given to such confessions. If, in submitting to the jury the question of the admissibility in evidence of the confessions, the court had been pursuing the proper course—which it did not—still, in excluding from the jury, by the instructions complained of, the testimony of the father of the defendant as to the statements made by him, the defendant was prejudiced.

The principle of law which rejects a confession made by one accused of crime, when made under circumstances which indicate that some inducement was held out to the accused which would be sufficient to induce a reasonable person, in a like situation, to speak out regardless of the truth or falsity of his

statement, rather than remain silent, is based upon the unreliability of such testimony—the probability of the statements being untrue. The principle itself had its origin in a spirit of consideration shown to accused persons, and is the expression of a natural reaction from the harshness and rigor prevailing in the administration of the criminal law a century and more ago. A confession belongs merely to a class of admissions, consisting, generally speaking, of a direct acknowledgment of guilt by one charged with a crime, and, because of the danger of its untrustworthiness, is governed by a special rule applicable only however, to its admissibility, and, when that rule is satisfied, it is to be treated as any other admission. These principles have been generally accepted; but the confusion has arisen from an apparent effort on the part of courts to establish a hard-and-fast rule for defining the test by which the admissibility of confessions is to be governed. Manifestly this could not be done, ⁵²² for the reason that every case must be governed by its own surrounding facts and circumstances. The only fair test, if such it can be called, which can be applied is this: Was the inducement held out to the accused such as that there is any fair risk of a false confession? For the object of the rule is not to exclude a confession of the truth, but to avoid the possibility of a confession of guilt from one who is in fact innocent.

In their desire to get away from the ancient doctrine that a confession by the accused would be received even though procured by torture, many of the courts have gone to the opposite extreme, and have held that any threat or promise made, any fear engendered in the mind of the accused, or any hope of bettering his condition held out to him, however slight, would exclude a confession made in consequence thereof, irrespective of the question whether in fact such threat, promise, fear or hope could, or in all human probability did, influence the accused to make a false confession. And so we find many instances wherein courts have simply sacrificed justice and common sense upon the altar of mere sentimentality. It is unnecessary here to review the decisions in the cases cited by appellant. Those cases, together with the cases and other authorities cited by the attorney general, fairly illustrate the great difference of opinion which has prevailed. It is worthy of note, however, that there appears to be a tendency now manifested quite generally to apply the principles here men-

tioned. In 1 Wigmore on Evidence, chapter 28, the entire subject is treated and the cases cited.

Certain testimony was introduced by the state as to statements made by the defendant respecting a certain mask. A motion was made to strike out the testimony, but the motion was denied. While we doubt very much whether the defendant could have been prejudiced, the evidence appears to be irrelevant and immaterial, and these are sufficient reasons for its exclusion.

523 For the reasons here given, the judgment and order are reversed, and the cause is remanded, with directions to the district court to grant the defendant a new trial.

Mr. Justice Smith concurs.

Mr. Chief Justice Brantly. I concur in the result.

Of the Competency as Evidence of an Alleged Confession, the court is ordinarily the sole judge. The court should, before admitting a confession in evidence, conduct a preliminary investigation, out of the hearing and presence of the jury, if requested by the defendant, to determine whether or not it is competent: *Ellis v. State*, 65 Miss. 44, 7 Am. St. Rep. 634. But see *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786, and authorities cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

CROCKFORD v. STATE.

[73 Neb. 1, 102 N. W. 70.]

CRIMINAL LAW—Custom as Defense to Crime.—A local custom cannot operate to suspend a criminal statute, or to overthrow the rules of evidence by which the commission of an offense is proved. (p. 877.)

CRIMINAL LAW—Stealing Cattle.—If one takes into his possession a calf found running at large with intent to steal it, and thus convert it to his own use against the owner's consent, thereby permanently depriving him of his property, he is guilty of the statutory crime of cattle-stealing. (p. 878.)

Beeler & Muldoon, for the plaintiff in error.

F. N. Prout, attorney general, and N. Brown, for the defendant in error.

¹ HOLCOMB, C. J. The defendant was found guilty of the larceny of a calf alleged to be of the value of ten dollars, but which the jury found to be worth only five dollars. Upon the rendition of the verdict of ² guilty, the court sentenced the accused to imprisonment in the penitentiary for the period of one year. The alleged larceny was committed in McPherson county, where grazing and stock-raising is the principal industry. The accused, while admitting that he obtained possession of the calf, testified that it came an orphan and in a half-starved condition to the premises where he was employed, and that as an act of kindness he placed it in an inclosure and cared for it as an estray, without any intent to steal.

1. It is urged upon us that the trial court committed prejudicial error in not permitting the defendant to prove a custom, claimed to exist in the locality where the offense was charged to have been committed, to the effect: "That

anyone finding a calf either upon the prairie, or upon his range, or upon his premises, that is lost from its mother, and in a starving or half-starved condition, to take up the calf and feed it and save its life, if possible. That unless the owner or any person claiming to be the owner comes and brings a cow to the place where the calf is, and that, unless the cow owns the calf and the calf the cow, it becomes the property of the taker up." We are not without scriptural authority for saying that the ox knoweth his owner and the ass his master's crib, and it would not seem unreasonable to conclude that the recognition by a cow of her offspring, especially before weaning time, ought to be of some probative value in determining the ownership of the calf. The real point of difference, however, in the case at bar, seems to hinge on the question of whether the cow should be taken to the calf, or the calf to the cow, for it is in evidence that when they were brought together the action of the older animal evidenced her maternal affection for her lost offspring, or, if not, that it is manifest that she was quite willing to become the foster-mother of the orphan calf. Whatever may be the force of the alleged custom, if proved, as to the respective rights of those taking up and holding estrays and those claiming to be the owners, we do not find warrant in law or precedent for holding that such a custom, if existing, could operate to ³ suspend a criminal statute, or to overthrow the rules of evidence by which the commission of an offense is proved. The point at issue is whether the accused took the calf in controversy with the intent to steal the same, and thus to convert it to his own use against the owner's consent and thereby permanently deprive him of his property; and not whether he refused to surrender the possession of an estray to one claiming to be the owner thereof. Whether the calf was or was not an estray at the time of the commission of the alleged offense is not of itself of vital importance. In either event it was property subject to be taken with intent to steal.

2. The following instructions are complained of:

"9th. The jury are further instructed that if you believe from the evidence beyond a reasonable doubt that the defendant took the calf mentioned in the information into his possession, or found it running with his stock, or with stock that was in his care or under his charge, and that at the time he so took it or found it he knew it was not his own, and that he then and there intended to steal and convert the calf

to his own use, and to deprive the owner of the calf, whoever he might be, and at the time took possession of the calf in question, and held such possession with such intention, this would amount to the crime of larceny, provided you further find all the other material allegations of the information are proved by the evidence beyond a reasonable doubt.

“10th. You are instructed that if you find from the evidence in this case that the calf described in the information was an estray, and that the defendant took it into his possession, or found it running with stock that was in his care, and took care of it and fed it with his stock or with other stock that was in his care, and that when he first took possession of the calf or discovered it with his stock that was in his care he did not intend to steal it or feloniously convert it to his own use, then he would not be guilty of larceny or receiving stolen property, although you find from the evidence beyond a reasonable doubt that he afterward ⁴ converted it to his own use with intent to deprive the owner of it.”

These instructions are approved in *Lamb v. State*, 40 Neb. 312, 58 N. W. 963, and were pertinent to the issues raised in the present case and to the evidence introduced in support of the charge made against the accused. There was really but one question for the jury to determine, and that was whether, when the accused took the calf, alleged to have been stolen, into his possession, he did so with the felonious intent to steal it; and these two instructions fairly submitted that issue to the jury as a question of fact which it was its province to pass upon.

3. It is argued that, aside from the confessions of the accused, there is no evidence to prove the corpus delicti—that is, that a larceny had been committed. There are other facts and circumstances in the record justifying the conclusion that the animal was stolen as alleged in the complaint, which, with the confession of the defendant offered in evidence, renders the evidence sufficient to support the verdict of guilty. We find no sufficient cause for reversing the judgment of the trial court, and the same is accordingly affirmed.

A Usage or Custom cannot be proved to contravene a rule of law: *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771; *Missouri etc. R. R. Co. v. Fagan*, 72 Tex. 127, 13 Am. St. Rep. 776; *Columbus etc. Coal etc. Co. v. Tucker*, 45 Ohio, 41, 29 Am. St. Rep. 528; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81.

The Crime of Larceny is the subject of a note to *People v. Miller*, 88 Am. St. Rep. 559.

LINCOLN TRACTION COMPANY v. WEBB.

[73 Neb. 136, 102 N. W. 258.]

STREET RAILWAYS—Liability.—Street railway companies are common carriers of passengers for hire, and liable as other common carriers upon common-law principles. They are bound to exercise extraordinary care and the utmost skill, diligence and human foresight for the protection of their passengers, and are liable for the slightest negligence, but they are not insurers. (p. 881.)

STREET RAILWAYS—Presumption of Negligence from Mere Injury.—Proof of mere injury by a street railway company, without more, does not raise a presumption of negligence sufficient to impose the burden of proof of due care upon the company, and, to enable the plaintiff to recover, he must prove an accident from which the injury resulted, or circumstances of such character as to impute negligence. (pp. 884, 885.)

STREET RAILWAYS—Negligence—Burden of Proof.—In an action against a street railway on its common-law liability for personal injury, the burden is on the plaintiff to prove that he was a passenger, was injured by the negligence of the defendant, or circumstances such as to impute negligence on its part, and the extent of his injury. (p. 885.)

STREET RAILWAYS—Negligence—Presumption—Burden of Proof.—If the nature of an accident on a street railway causing personal injury, when proved or conceded, is such as to fairly raise a presumption of negligence, proof of such accident, it being the proximate cause of the injury complained of, is sufficient. (p. 886.)

Clark & Allen, for the plaintiff in error.

Billingsley & Greene and R. H. Hagelin, for the defendant in error.

¹³⁶ BARNES, J. In this case the Lincoln Traction Company prosecutes error from a judgment of the district court for Lancaster ¹³⁷ county in favor of one Wilhelmina Webb, who will hereafter be called the plaintiff, and the traction company will be called the defendant.

The principal assignment of error discussed by counsel is that the court erred in giving the sixth paragraph of his instruction to the jury. For a clear understanding of the question presented, it is necessary to state the issues as made by the pleadings. The charging part of the petition is as follows: "That on or about the first day of August, 1903, the plaintiff, at the special instance and request of the defendant company, became and was a passenger on said street railway to be carried in its cars safely from the postoffice building in said city to 19th and O streets on said railway, for the sum of five cents; that when the car on which plaintiff was a pas-

senger was between 18th and 19th streets, on O street in said city, the plaintiff rang the bell to notify the defendant that she desired to leave said car at 19th and O streets; and when the car reached said 19th and O streets it stopped, and the plaintiff started to get off said car, and before plaintiff had time to leave said car, and while standing on the steps of said car, the defendant carelessly and negligently started said car without a bell ring from the car's conductor, and plaintiff, without negligence on her part, was by the negligence and carelessness of the defendant, as above alleged, thrown violently from said car to the hard pavement, and suffered great and permanent injuries."

The answer was a general denial and a plea of contributory negligence, which was denied by the reply. It is also proper to state that the evidence as to whether the car was stopped a sufficient length of time for the plaintiff to alight, or whether she got off from the car carelessly and negligently while the same was in motion, and was thus guilty of contributory negligence, was, to say the least, conflicting. On the issues presented by the pleadings and the evidence, as above stated, the court gave the instruction complained of, which reads as follows:

138 "6th. The burden of proof is on the plaintiff to prove by a preponderance of the evidence that she received the injuries complained of while being transported by the defendant company at about the time and place alleged, and that by reason thereof the plaintiff has sustained damages. On the other hand, when the plaintiff has shown that she met with an injury, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of the negligent act complained of in the plaintiff's petition, said act being the proximate cause of the plaintiff's injuries. The burden of proof is also upon the defendant to show that some negligence of the plaintiff contributed to her injuries as the proximate cause thereof, unless the plaintiff in making her own case has shown that some act of hers contributed to said injury."

It will be observed that this instruction placed the burden on the defendant company, after the injury was shown, to prove by a preponderance of the evidence that it was not guilty of the negligent act set forth in the plaintiff's petition. Its effect was to shift the burden of proof on the question of negligence from the plaintiff, who held the affirmative of that

issue, to the defendant, as soon as it was shown that she had been injured. At this point it may be said that it is the settled law of this state that street railways are common carriers of passengers for hire, and are liable as other common carriers upon common-law principles. They are bound to exercise extraordinary care and the utmost skill, diligence and human foresight for the protection of their passengers, and are liable for the slightest negligence, but they are not held to the strict liability of insurers; that is to say, they are not governed by the provisions of section 3, article 1, chapter 72, of the Compiled Statutes of 1903 (Ann. Stats. 10039), which defines the liability of steam railways in this state for damages inflicted upon passengers: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 316; *Pray v. Omaha Street R. Co.*, 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. 447; *East Omaha ¹⁸⁹ Street R. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491; *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; *Omaha Street R. Co. v. Boesen*, 68 Neb. 437, 94 N. W. 619. It follows that, before the plaintiff could recover in this case, it was necessary for her to allege and prove some negligent act of the defendant company which was the proximate cause of the injury complained of. The rule seems to be well settled that the burden of proof never shifts, but remains with the party holding the affirmative. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon him to establish it by proof: *Rapp v. Sarpy County*, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; *Kay v. Metropolitan Street R. Co.*, 163 N. Y. 447, 57 N. E. 751. It was said by the supreme court of Massachusetts in *Central Bridge Corp. v. Butler*, 68 Mass. 130: "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established": See, also, *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 73 Pac. 164; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871.

It is true that in some cases loose expressions may be found that the burden of proof shifts when the fact that is the basis of a presumption of negligence is made to appear. But it is

believed that no court has upheld such a ruling when its attention has been challenged thereto. The burden always rests on the party who has the affirmative, and actions for personal injuries against common carriers are no exception to this rule unless they are made so by statute. Again, by this instruction the jury were told, in substance, that when the plaintiff had shown that she was a passenger, and had met with an injury, the burden of proof was on the defendant to show by a preponderance of the evidence that it was not guilty of the negligent act complained of in her petition. This, in ¹⁴⁰ effect, informed the jury that proof of the injury raised a presumption of negligence. The negligent act charged in the petition was the sudden starting of the car while the plaintiff was alighting therefrom, and the jury were told that the burden of proof was on the defendant to show that the car did not so start. This was clearly wrong. The court must have misapprehended the rule upon which the doctrine of the presumption of negligence rests. This presumption arises, if at all, from the proof made or conceded facts from which negligence on the part of the defendant may be inferred. We cannot infer that the car suddenly started and threw the plaintiff from the mere fact that she fell and struck on the back of her head. She might have fallen when attempting to alight if the car were standing still. And, again, she might have slipped or stumbled, and for that reason have fallen immediately after alighting from the car. The basis of the presumption in actions against carriers for personal injuries is not the mere fact of the injury, but is the act of the defendant which causes the injury. In *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 316, it appeared that the car in which the plaintiff was riding was derailed. He alleged that he was injured thereby, and there was evidence to support the allegation. It was said: "He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him." This was enough. The burden was then on the carrier to rebut this proof of negligence by showing that it was produced by causes wholly beyond its control. In that case the fact of derailment was admitted and was therefore the basis of the presumption of negligence. In the case of *Omaha Street R. Co. v. Boesen*, 68 Neb. 437, 94 N. W. 619, it was alleged in the petition that the plaintiff was injured by the derailment of the defendant's car. The charge

of derailment was denied by the answer, which also contained a plea of contributory negligence, in that defendant was injured by jumping from the rapidly moving train. There was a conflict of evidence ¹⁴¹ on those questions, and the court gave an instruction as follows: "You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he was injured while a passenger of the defendant, the extent of his injuries and the damages occasioned thereby. . . . And the burden of proof is upon the defendant to show by a preponderance of the evidence that such injuries, if any, were received while a passenger, by being thrown from a car because of the derailment thereof, were without fault on defendant's part, and that they could not have been avoided by the exercise of the highest degree of skill and diligence on the part of the defendant, consistent with its business."

The judgment of the trial court was reversed, and in the opinion is found the following: "It may be stated, as a general proposition, that a street railway company is a common carrier of passengers for hire; that, ordinarily, it will be sufficient for one to show that he was a passenger, that while such passenger he was injured, and the extent of such injuries. It will then devolve upon the company to show that the injury occurred without any negligence on its part, and that by the exercise of the highest degree of care it could not have prevented such injury. It will be found, however, that this doctrine has been laid down in cases where there was a collision, or where the person injured had been struck or run over by a street-car—in short, in cases where the undisputed cause of the injury fairly raised the presumption of negligence. . . . He [the plaintiff] alleged, as a substantive part of his case, that he was thrown from the car by a derailment of it, caused by the negligence of the company; and it would seem that before he could make his case it would be necessary to show, at least, that he was thrown from the car as alleged in his petition, before any presumption of negligence could arise."

This rule is sustained by the decisions of the federal ¹⁴² courts: See *Frizzell v. Omaha Street R. Co.*, 124 Fed. 176, 59 C. C. A. 382, and the cases there cited.

It is true that the cases of *Stokes v. Saltonstall*, 38 U. S. *181, 10 L. ed. 115, *Western Transp. Co. v. Downer*, 78 U. S. 129, 20 L. ed. 160, and *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. Rep. 653, 35 L. ed. 270,

are sometimes cited as announcing a contrary doctrine, but an examination of those cases shows that in each of them the accident itself, which was the proximate cause of the injury complained of, raised the presumption of negligence, and thus supplied the plaintiff with the proof which otherwise he would have been required to make. The English case of *Christie v. Griggs*, 2 Camp. N. P. 79, is a leading case on this question. The opinion reads as follows: "I think the plaintiff has made a *prima facie* case by proving . . . the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skillfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied."

In *Rose v. Stephens & Condit Transp. Co.*, 20 Blatchf. (U. S.) 411, 11 Fed. 438, it was said of the presumption of negligence: "The presumption originates from the nature of the act, not from the nature of the relations between the parties."

In *McDonald v. Montgomery Street R. Co.*, 110 Ala. 161, 20 South. 317, it was said: "Proof of mere injury, without more, does not raise a presumption of negligence, sufficient to impose on the company the burden to prove due care on its part. In order to recover, it is incumbent on the plaintiff to show an accident, ¹⁴⁸ from which injury resulted, or circumstances of such character as to impute negligence."

In *St. Louis & S. F. R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883, the court said: "It is true that the burden was upon the appellee to show by proof that the railway company was guilty of negligence. The mere fact that the appellee was injured, without more, was not sufficient to raise a presumption of negligence on the part of the railway company. But the derailment of the car and its overturning, and the injury to the appellee thereby, being in the usual course, the logical inference of negligence might be drawn therefrom. . . . In such a case, *res ipsa loquitur*."

But this rule applies only when the circumstances are such as to afford just ground for a reasonable inference that ac-

According to ordinary experience the accident would not have occurred except for want of due care. If causes other than negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence: *Wadsworth v. Boston Elevated R. Co.*, 182 Mass. 572, 66 N. E. 421. The presumption of negligence has been more frequently applied in cases of passengers than in any other; but there is no foundation in reason or authority for such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relation between the parties. The duty which the law enjoins in the two cases—carriers and noncontract cases—only differs in the degree of care to be exercised. The principle of law involved is the same, and the reason of the rule is not found in the relation between the parties. The presumption arises from the inherent nature and character of the act. No further authorities need be cited in support of this rule. It is contended, however, that this case should be governed by the rule announced in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074. In that case the judgment was reversed solely because the trial court instructed the jury that in order ¹⁴⁴ to defeat a recovery, the burden was on the defendant to prove gross contributory negligence on the part of the plaintiff, and the question in dispute herein was not involved in that case. It was said, however, by the learned judge who wrote the opinion: "In an action for damages for an injury received while being transported by a common carrier, the injury being shown, the burden of proof is upon the carrier to show that it was in nowise at fault."

It is quite probable that the trial court gave the instruction complained of because of the statement quoted above. We cannot wholly approve of that expression. It seems clear that it is too broad, and is not a correct statement of the law. It is incorrect to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. A presumption arises from the cause of the injury, or from other circumstances attending it, but not from the injury itself. The better rule is found in *Chicago, B. & Q. R. Co. v. Howard*, 45 Neb. 570, 63 N. W. 872, where it is said: "The presumption of negligence, where entertained, must be from proved and conceded facts, and from such must be the logical, reasonable and probable deduction."

From the foregoing it would seem clear that the opinion in *Lincoln Street R. Co. v. McCellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074, should be modified to conform to the rule announced herein. That the instruction complained of was wrong because it assumed that the contract of carriage and the injury were the basis of a presumption of negligence. There was no basis for the presumption in the instant case until it was proved that the sudden starting of the car was the cause of the plaintiff's injury. That fact being disputed, the burden of proof was on the plaintiff to establish it by a preponderance of the evidence.

We therefore hold that, in actions against common carriers on their common-law liability for personal injuries, the burden is on the plaintiff to prove that he was a passenger, was injured by the negligence of the defendant, ¹⁴⁵ and the extent of such injuries. That where the nature of the accident, when proved or conceded, is such as to fairly raise the presumption of negligence, proof of such accident, which is the proximate cause of the injury complained of, is sufficient. But where from the nature of the accident the presumption of negligence does not arise, as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases his cause of action.

It is also contended that the evidence was not sufficient to sustain the verdict. But as the judgment must be reversed for another cause, and the case may be tried again, we decline, at this time, to express any opinion on that question.

For the foregoing reasons, the fourth paragraph of the syllabus to *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074, is disapproved, and the opinion therein modified to conform to the rule announced above. The judgment of the district court is reversed and the cause remanded for a new trial.

HOLCOMB, C. J., Concurring. Although reluctant to consent to the overruling of the proposition announced in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074, relative to the presumption of negligence when an injury has occurred to a passenger while being transported by a common carrier, which was agreed to by a unanimous court, I am convinced that the rule therein stated is not an accurate expression of the law on the subject, and is without substantial support in authority or principle. It should be said that a ruling on this particular question was not in that

case essential to the decision rendered. An examination of the briefs of counsel discloses that the only questions which were presented and argued were with reference to whether simple contributory negligence on the part of the injured passenger would bar recovery, or whether the negligence ¹⁴⁶ must be gross; also whether the statute making steam railroads liable for injuries to passengers, except in cases where the injury done arises from criminal (gross) negligence to the person injured, is applicable to street railways. The instruction considered in that case permitted a recovery unless the jury should find that the injured passenger was guilty of gross negligence which contributed to the injury received. It thus becomes obvious that the opinion, in so far as it discusses and lays down the rule relative to the presumption of negligence arising from the mere fact that an injury occurred to a passenger while being transported by the street railway company, is obiter dictum.

As has well been said, the mere fact of an injury to a passenger while being transported is, regarding the question of negligence, colorless, and raises no legitimate inference as to the carrier's failure to perform some duty owing to the passenger. Passengers while being transported are frequently injured by their own acts, and by extraneous causes in no way connected with the means employed in transporting the passengers, as well as by the negligent acts of the carrier. It is difficult, therefore, to perceive why it should be said that proof alone that the passenger was injured while being transported raises the presumption that the negligence of the carrier was the proximate cause of the injury. It is said in *Swift & Co. v. Holoubek*, 60 Neb. 784, 84 N. W. 249: "Negligence will not be presumed in the absence of facts or circumstances from which its existence may reasonably be inferred. In the absence of evidence, the presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by the evidence." In the case at bar the injury is alleged to have been caused by the street-car being started while the passenger was alighting, and by reason thereof she was thrown to the pavement and sustained the injuries complained of. If this fact had been conceded or established by the evidence to the satisfaction ¹⁴⁷ of the jury, then, doubtless, the presumption of negligence would arise, and it would devolve upon the carrier to show that it exercised that degree of skill, diligence and foresight for the

safety of its passengers which the law charges it with. This alleged cause of the injury, however, was the pivotal point in the controversy and regarding which the evidence was conflicting. The burden of proof was upon the plaintiff to establish the fact upon which she relied as a basis for the presumption of the negligence charged. She was required to prove, it being disputed, that the injury complained of was chargeable to the acts of the defendant's servants or the means and appliances employed in her transportation. It was the defendant's contention that the plaintiff's injury was caused by her own carelessness and voluntary action in stepping from the car while in motion. The plaintiff was therefore required to go one step further than as stated in the instruction complained of, and establish by the evidence that the cause of the injury was the starting of the car while she was in the act of alighting therefrom. In a well-considered case—*Benedick v. Potts*, 88 Md. 52, 50 Atl. 1067, 41 L. R. A. 478—it is said the doctrine of *res ipsa loquitur* does not go to the extent of implying that you may, from the mere fact of an injury, infer the physical act that produced the injury, but it means that when the physical act has been shown or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. Another court has said: "When a passenger is injured in an accident to the machinery, appliances or means provided for his transportation, it is unnecessary for him, in the first instance, to do more than prove the fact of the injury, and show that the accident in which it was received was due to the failure or insufficiency of some of the agencies provided for the carriage. When such proof is made, the burden is transferred to the carrier to show its own freedom from fault, and that the accident was one which the utmost skill, ¹⁴⁸ care and prudence could not have prevented. . . . But the rule does not apply in the case of an accident unconnected with the means of transportation": *Denver & R. G. R. Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. 978.

If the injury is caused to the passenger by apparatus wholly under the control of the carriers, and furnished and applied by it, a presumption of negligence arises. It is only when the injury occurred from the abuse of agencies within the defendant's power that it can be presumed to act negligently: *Chicago City R. Co. v. Catlin*, 70 Ill. App. 97. The true rule seems to be that, where a passenger sustains an injury growing

out of the acts of the carrier's servants or employés, or because of any defect in machinery, coaches or roadway, or any of the means, appliances or agencies connected with or employed in the transportation of the passenger, the presumption arises that the injury was caused by the negligence of the carrier, and it then devolves upon it to explain the act and relieve itself of the imputation of negligence thus cast upon it, the negligence complained of being the proximate cause of the injury inflicted: *Connell's Exrs. v. Chesapeake & O. R. Co.*, 93 Va. 44, 57 Am. St. Rep. 786, 24 S. E. 467, 32 L. R. A. 792; *Spencer v. Chicago, M. & St. P. R. Co.*, 105 Wis. 311, 81 N. W. 407. In 6 *Cyclopedia*, 629, the author of the text, in speaking of this particular subject, says: "His [the passenger's] right of action for injuries is based on negligence, and the burden of proof of negligence is on plaintiff. Therefore the mere proof of an injury to the passenger in course of transportation, which, so far as it is shown, might have occurred by reason of other cause than the carrier's negligence, such as the act of the passenger himself, or without fault of anyone, will not make a *prima facie* case."

The courts and text-writers all appear to be of one mind and in substantial accord on the question, and, on principle, it would seem that the passenger must at least assume the burden of proving the proximate cause leading to the injury, if not conceded, and that such injury was ¹⁴⁹ the result of some fault or imperfection in the means, appliances and agencies employed by the carrier in the transportation of the passenger.

The Duty and Liability of Street Railway Companies to passengers are discussed in the note to *Ormandroyd v. Fitchburg etc. Ry. Co.*, 118 Am. St. Rep. 462.

The Presumption of Negligence, if any, arising from an accident causing injury to a railway passenger is discussed in the note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 1020. The presumption of due care is the subject of a note to *Chicago etc. Ry. Co. v. Wilson*, 116 Am. St. Rep. 108.

JUNOD v. STATE.

[73 Neb. 208, 102 N. W. 462.]

LARCENY OF FIXTURES.—One who by his wrongful acts converts a fixture into personal property, and then with larcenous intent forthwith carries it away without the consent of the owner, may be rightfully convicted of larceny. (p. 892.)

LARCENY.—Wire fastened to posts for fencing a portion of the public domain for temporary use as a pasture is personal property, and one who removes it and carries it away without the consent of the owner, and with intent to steal it, is guilty of larceny. (p. 892.)

APPEAL—Definition of Reasonable Doubt.—A judgment will not be reversed solely on the ground that a questionable definition of reasonable doubt is given to the jury. (p. 893.)

APPEAL—Instructions Correct as Whole.—If the instructions given are correct as a whole, and fully state the law of the case, error cannot be predicated on a single sentence or clause of such instructions. (p. 893.)

E. D. Clark and Hamer & Hamer, for the plaintiffs in error.

N. Brown, attorney general, and W. T. Thompson, for the defendant in error.

200 BARNES, J. An information was filed in the district court for Cherry county during the November, 1902, term thereof, against John Junod, Harry Junod and Thomas J. Nelson, charging them with the crime of grand larceny. After a plea of not guilty, Nelson demanded a separate trial, and the Junods making no such demand were tried together and found guilty, as charged in the information. The value of the property stolen was fixed by the verdict of the jury at forty dollars. From a sentence of five years each in the penitentiary, they bring the case here by a petition in error. The property stolen was a quantity of wire owned by one David A. Hancock, and the evidence shows that it was taken from a fence which inclosed a pasture situated on the public domain which Hancock used as a summer pasture for his stock.

The plaintiffs herein contend, first, that the evidence is not sufficient to sustain the verdict, because it does not connect them with the commission of the crime. The record discloses that the stolen wire was found in their possession; that it was pointed out to the owner by Harry Junod, and the place where it was joined onto other wire, thus making a fence which inclosed his pasture, was designated by him. When asked how he came by the wire, he stated to Hancock and the officers

and other persons present ²¹⁰ that he bought it from a man, whose name and place of residence he refused to disclose. When John Junod was arrested he claimed to have purchased the wire from one Bowers, and said he gave it to his brother Harry. Bowers was produced as a witness for the state, and testified that he never saw the wire in question and never sold it to John Junod, or any other person. Other incriminating facts and circumstances were shown which seem to clearly establish the fact that the plaintiffs were the identical persons who stole the wire, and so we conclude that the verdict is amply sustained by the evidence.

Plaintiffs' second contention, and the one on which they lay the most stress, is that the property in question was a fixture to real estate, and for that reason was not the subject of larceny. It was described in the information as follows: "Ten thousand pounds of wire, of the value of three hundred dollars, the personal property of David A. Hancock." The evidence in support of the charge discloses that one Anderson was the owner of a ranch in Cherry county, Nebraska, consisting of what was called the "Dewey Lake Ranch, and the Niobrara Pasture"; that on the twenty-seventh day of July, 1901, he sold the property to the prosecuting witness, David A. Hancock. The Niobrara pasture appears to have been a tract of government land inclosed by a temporary post and wire fence constructed by Anderson, and for which he gave Hancock a bill of sale when he conveyed the other ranch property to him. The evidence shows that the wire in question was torn or cut from the posts surrounding the pasture above described, was wound up on home-made spools, and then hauled away in wagons to the premises of Harry Junod, where it was afterward found and identified.

It is true that the old common-law rule with respect to the crime of larceny was, that where the article taken was in fact and in law a fixture to real estate, to constitute that crime the severance and asportation must be separate and distinct acts. Authorities can be found which hold that at least a day must elapse between the acts of severance ²¹¹ and asportation. In other words, that during the day of severance the property stolen retains the character of real estate, but on the following day it becomes converted into personal property, and if then carried away without the consent of the owner, such asportation is larceny. These fine technical distinctions and absurd sophistries are repugnant to our concep-

tions of justice, and the courts of most states have discarded them; while those which in a measure retain them have confined the rule within the most narrow limits. Undoubtedly the modern and true rule is that he who by his wrongful acts converts a fixture into personal property, and then with larcenous intent forthwith carries it away without the consent of the owner, may be rightfully convicted of larceny. In *Jackson v. State*, 11 Ohio St. 104, it was said: "The rule of the common law, that things savoring of the realty are not the subjects of larceny, only applies to things issuing out of or growing upon the lands, and such as 'adhere' to the freehold, but not to personal chattels which are only constructively annexed thereto."

In the body of the opinion in that case we find the following language: "The wrongful severance does not destroy the title nor the constructive possession of the owner; it is still his property in its altered condition, and its felonious asportation, though immediate, would seem to be as much a felonious taking of the personal property of another from his possession and without his consent, as if the wrongdoer had severed it on one day and removed it the next. In every case there is necessarily a point of time between its severance and its asportation, and, upon principle, we can see no difference between one instant of time and a period of twenty-four hours, for, in that interval, brief as it may be, 'the property lodgeth in the right owner as a chattel,' and a felonious taking thereof should be larceny."

Again, it would seem from the evidence that the wire in question never became a fixture to or a part of the realty, but at all times retained its original nature as a ²¹² personal chattel. It was such in its originally manufactured condition, and it seems clear that it was never intended to affix it or make it a permanent part of the land inclosed as a temporary pasture. Anderson never intended to make this fence a permanent part of the public domain, or in other words, a permanent accession to the freehold. He intended to use the government's land as a pasture as long as he was unmolested and permitted to do so, and then remove the fence. This is clearly shown by his treatment of it as a chattel, and the conveyance of it to Hancock by an ordinary bill of sale. So the stolen wire never became a fixture to the real estate, but always remained personal property, and therefore was at all times the subject of larceny.

It is further contended that the court erred in giving certain of his instructions to the jury, and several assignments of error are presented in support of this contention. The last of these will be considered first, because it is the one most strenuously argued. It relates to that paragraph of the instructions by which the court attempted to define a reasonable doubt. We will not quote the instruction, for it is a copy of the one given in *Willis v. State*, 43 Neb. 102, 61 N. W. 254, *Barney v. State*, 49 Neb. 515, 68 N. W. 636, and *Mays v. State*, 72 Neb. 723, 101 N. W. 979. We have heretofore steadily refused to reverse a judgment of conviction solely because of this instruction, and we still refuse to do so. We decline to approve of it, however, because it is doubtful if any attempt by a trial court to give a technical or extended definition of a reasonable doubt can accomplish any good result. In the case of *United States v. Hopkins*, 26 Fed. 443, Dick, J., said: "The inherent imperfection of language renders it impossible to define in exact express terms the nature of a reasonable doubt. It arises from a mental operation, and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge, or the occurrence of a particular event, or the existence of a thing. It is a matter that must be determined by a jury, acting under the ²¹³ obligations of their oaths and their sense of right and duty."

It is also claimed that the court erred in giving other instructions, but in order to sustain this contention counsel quote certain sentences or clauses contained in some of the paragraphs of the charge, and thus attempt to predicate error. The rule is, that each paragraph of the charge must be read in full, and the instructions thus read should be considered together. When so read and considered, if the charge, as a whole, is a correct statement of the law, criticisms of the kind above described will be disregarded.

A careful reading of all of the instructions given in this case discloses that, as a whole, they are correct. And the rights of the accused persons could not have been prejudiced thereby.

We have been impressed, however, from an examination of the record in this case, with the thought that the sentence imposed upon the plaintiffs in error herein was excessive. The value of the property stolen was found by the jury to be only forty dollars. If it had been found to be less than thirty-five dollars, the plaintiffs could have only been fined in a sum

not exceeding one hundred dollars, or imprisoned in the county jail for a time not exceeding thirty days. But because the value of the property was forty dollars instead of less than thirty-five dollars, the plaintiffs were each sentenced to imprisonment in the penitentiary of this state for a period of five years. This sentence is so disproportionate to the nature of the crime of which the plaintiffs were convicted that it shocks one's sense of fairness and justice. We are convinced that we should exercise the power given us by section 509a of the Criminal Code, and reduce the sentence in this case to the period of two years and six months, which is accordingly done.

Finding no reversible error in the record, the judgment of the trial court, as modified above, is hereby affirmed.

Judgment accordingly.

Larceny of Property Annexed to the Freehold or savoring of realty is discussed in the note to *People v. Miller*, 88 Am. St. Rep. 589.

The Doctrine of Reasonable Doubt is the subject of a note to *Burt v. State*, 48 Am. St. Rep. 566. In giving instructions on reasonable doubt it is best simply to follow the language of the statute: "If there be a reasonable doubt of the defendant being proven guilty, he is entitled to an acquittal": *Jolly v. Commonwealth*, 110 Ky. 190, 96 Am. St. Rep. 429.

STATE v. MICKEY.

[73 Neb. 281, 102 N. W. 679.]

STATUTES—Proof of Passage.—The only evidence to which recourse may be had in determining whether a bill has been duly enacted into a law is the duly authenticated enrolled bill approved by the governor, and the legislative journals. (p. 898.)

STATUTES—Authentication—Proof of Passage.—A law cannot be established by the certificates of the clerical officers of each branch of the legislature, made after the final adjournment of the session for the purpose of showing that such law was duly passed and authenticated. (p. 899.)

CONSTITUTIONAL LAW—Enactment of Statutes.—Under a constitutional provision that the presiding officer of each House of the legislature shall sign all bills passed thereby, a bill not thus authenticated does not become a law. (pp. 900, 901.)

A. W. Lane, for the relator.

F. N. Prout, attorney general, and N. Brown, for the respondent.

²⁸² HOLCOMB, C. J. A writ of mandamus is applied for to require the respondent, the governor, to appoint a commission of five persons, whose duty it shall be to supervise the selection of a site on the capitol grounds and the erection of a monument to be dedicated to the memory of the life and public services of President Lincoln. The application is based on what purports to be an act of the legislature which is carried into the Laws of 1903, and published as chapter 157 thereof. The governor, we are advised, declines to act through no lack of sympathy for the object sought to be attained, but because of a doubt as to the validity of the law which must be looked to for authority to proceed. The right to the writ prayed for depends, therefore, upon the validity of the enactment referred to. The following certificate made by the Secretary of State is found at the close of the printed laws passed by the legislature at its twenty-eighth session (Laws 1903, p. 747):

“All of the foregoing laws (except as otherwise noted in connection with the same) are signed and attested as follows, to wit: John H. Mockett, Jr., Speaker of the House of Representatives. Attest: John Wall, Chief Clerk of the House of Representatives. Edmund G. McGilton, ²⁸³ President of the Senate. Attest: A. R. Keim, Secretary of Senate.” There is found attached to chapter 157 (House Roll No. 78), the act in question, the following certificates: “I, C. H. Barnard, first assistant chief clerk of the House of Representatives of the state of Nebraska, do certify that the copy of House Roll No. 78, hereto attached, is a full and correct copy of said House Roll No. 78 as passed by the House March 31 by a vote of 60 yeas to 12 nays; that it was transmitted to the Senate on the same day, and on April 6th returned from the Senate indefinitely postponed. On April 7th it was recalled from the House for further consideration and on the 8th of April transmitted to the House and passed, where, by oversight, the bill failed to be sent to the enrolling-room.

“Given under my hand this 14th day of April, A. D. 1903.

“C. H. BARNARD,

“First Assistant Chief Clerk of the House.”

“State of Nebraska,—ss.

“I, A. R. Keim, Secretary of the Senate of the state of Nebraska, do hereby certify that the copy of said House Roll No. 78, hereto attached is a full and correct copy of said House

Roll No. 78 that was read the third time on the 8th day of April, 1903, and was duly passed by the Senate by a vote of 30 yeas to 2 nays, and was thereafter on the same day transmitted to the House of Representatives with a certificate attached that the same had been passed by the Senate.

“Given under my hand this 14th day of April, 1903.

“A. R. KEIM,

“Secretary of the Senate.”

This bill appears to have been approved by the governor on April 14, 1903. An inspection of the enrolled bills in the office of the Secretary of State passed by the legislature at the session mentioned discloses that the only authentication of the act under consideration is to be found in the two certificates above set forth. The bill is in no ²⁸⁴ wise authenticated by the signature of either of the presiding officers nor do the names of either or any of the clerical officers of either House appear on said bill as attesting the signatures of the presiding officers. It may also be said that the measure in question does not appear to have the earmarks of being an enrolled bill, such as is customary after the final passage of an act through both branches of the legislature. It is in all probability a copy of the engrossed bill procured at the time it was certified to as above mentioned. The legislature adjourned sine die on the eighth day of April, 1903. The question presented, therefore, is whether House Roll No. 78, the act in question, has been passed through both branches of the legislature, authenticated and approved with all of the formalities required to give it the force of law.

1. The only evidence of the purported law as being the measure passed by the legislature, and of its due enactment and promulgation by the legislative branch of government, is to be found in the certificates attached to the bill. To be sure, an inspection of the legislative journals discloses that an act entitled the same as the one under consideration was introduced and duly passed through each branch, with amendments; the contents of the bill and the nature of the amendments being otherwise undisclosed. The language of the body of the bill when introduced or as finally passed and after amendment is unascertainable save by resort to what purports to be the bill as finally passed, to which is attached the certificates heretofore quoted or other evidence of an extraneous character. These certificates, it will be observed, were made and attached to the purported bill after the

final adjournment of the legislature. They are no part of the proceedings of either branch and are not to be found in the journals of the legislative body. They were not made by those executing them as any part of the action taken by either of said bodies. As evidence these certificates, it would seem, possess no greater value than would the sworn testimony of the parties making them. We are ²⁸⁵ then brought face to face with the proposition of whether evidence outside of the enrolled bills and the legislative journals may be resorted to for the purpose of establishing that a particular bill has duly passed both branches of the legislature with all the formalities required by the fundamental law, and has been duly authenticated and promulgated so that nothing further is required save action by the executive. In many jurisdictions it is held that the enrolled bill properly authenticated by the signatures of the presiding officers of each branch of the legislature and approved by the governor is the exclusive and only evidence of the due enactment of the measure into law. In this jurisdiction it is held that the enrolled bill may be impeached by the records contained in the legislative journals; but it has not been held that resort may be had to evidence of an extraneous character to prove or disprove the validity of a legislative enactment. In the case of *In re Granger*, 56 Neb. 260, 76 N. W. 588, it is held:

“Where from the journals of both branches of the legislature and from the copy of the bill sent to the governor for approval, and by him approved, and which was attested by the proper officers of both Houses, it is shown that a certain bill was properly passed, that fact cannot be disproved by the introduction in evidence of what it is agreed between the litigants was the bill originally introduced and memoranda thereon indorsed tending to show that the bill approved and attested was not the one really passed by both Houses.” In the body of the opinion, quoting approvingly from a case entitled *Division of Howard County*, 15 Kan. 194, it is said: “It will be noticed that the legislative journals and the enrolled bills are the only records required by law to be kept for the purpose of showing any of the legislative proceedings. There is no provision for preserving the engrossed bills as a record of the legislative proceedings. And as the legislative journals and the enrolled bills are, by law, records, and the only records of leg-

islative proceedings, they must of course import absolute verity, and be conclusive proof as to ²⁸⁶ whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not. . . . Now, as we have before intimated, the enrolled bills and the legislative journals, being records provided for by the constitution, importing absolute verity, we cannot take judicial notice that they are untrue, nor can we even allow evidence to be introduced for the purpose of proving that they are not true. Therefore, as the enrolled bill of the law dividing Howard county, and the journals of the legislature, would seem to prove that said bill has been legally passed by the legislature, and has been legally approved by the governor in the form as it now appears enrolled in the secretary's office, we cannot take judicial notice that said bill was not properly so passed and so approved, and we cannot even allow evidence to be introduced showing that it was not so passed and so approved." Again, in *State v. Abbott*, 59 Neb. 106, 80 N. W. 499, it is directly held: "The enrolled bill, authenticated by the proper officers of the House, approved by the governor, and filed with the Secretary of State, and the journals of the Houses are the official records of the proceedings of the legislature relative to the enactment of the law, and are the only competent evidence in a controversy in regard to the due passage of the bill, or in respect to alleged material errors in its substance." In the body of the opinion, the character of the evidence which may be considered in determining whether a law has been duly enacted is thus stated: "The decisions may be classified into those in which the enrolled bill has been deemed conclusive, and those recognizing the doctrine that courts will look back of said bill and examine and consider the journals of the legislature: See 23 Am. & Eng. Ency. of Law, 1st ed., 200. In some cases the courts of last resort have approved the reception in evidence of the engrossed bill: See 23 Am. & Eng. Ency. of Law, 1st ed., 198; *Berry v. Baltimore & D. P. R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 South. 1. In this state we have not decided the enrolled bill to be ²⁸⁷ conclusive, but have examined the legislative journals. In no case up to the present has the supreme court approved the reception and consideration of anything more or further than we have just stated: See *Hull v. Miller*, 4 Neb. 503; *Cottrell*

v. State, 9 Neb. 125, 1 N. W. 1008; Ballou v. Black, 17 Neb. 389, 23 N. W. 3; State v. McLelland, 18 Neb. 236, 53 Am. Rep. 814, 25 N. W. 77; State v. Robinson, 20 Neb. 96, 29 N. W. 246; In re Groff, 21 Neb. 647, 59 Am. Rep. 859, 33 N. W. 426; State v. Van Duyn, 24 Neb. 586, 39 N. W. 612; State v. Moore, 37 Neb. 13, 55 N. W. 299; In re Granger, 56 Neb. 260, 76 N. W. 588. In the case last cited the consideration of other evidence than the enrolled bill and the journals was in effect disapproved."

The opinion also discusses the method of procedure in the legislature by which an act is transformed into law, which is of interest in connection with the question under consideration, but which need not here be reiterated. The prior utterances of this court lead, we think, logically to the conclusion that the only evidence to which recourse may be had in determining whether a bill has been duly enacted into law is the duly authenticated enrolled bill approved by the governor and the legislative journals—the latter only when affirmatively showing that some vital requirement of the fundamental law to the valid enactment of a law has been ignored or disregarded. Such being the case, the attempt to establish the law in question by the certificates of the clerical officers of each branch of the legislature made after the final adjournment of the session is unauthorized. The evidence is incompetent and insufficient for the purpose of showing that the act in question was passed through each branch of the legislature in the manner provided by law, and authenticated in a manner required to give it the sanction and force of law when approved by the governor. Without the certificates, there is nowhere found any evidence that the purported act, as it is found among the enrolled bills and in the session laws, was in the same form in which it was when passed by each branch of the legislature. The identity and authenticity of the measure is in doubt and uncertainty, unless these certificates may be accepted ²⁸⁸ in lieu of the signatures of the presiding officers provided for by the constitution. This, in our judgment, cannot be done, and the certificates must be rejected as competent evidence for the purpose for which offered.

2. It is argued that the enrolled bills signed by the presiding officers of the legislature are *prima facie* evidence only of their due passage through that body, and that the governor in approving a measure may from other sources

ascertain whether the act as approved was passed by the legislature, and that, having approved the measure, the court will presume that he had sufficient evidence before him to show that it was the bill passed by the legislature and in the same form as when finally passed. As we have seen, the enrolled bill and the legislative journals alone can be looked to in order to establish what the law is. In support of counsel's contention in this regard, we are cited to the case of *Cottrell v. State*, 9 Neb. 125, 1 N. W. 1008. We think that a careful analysis of the decision in that case will hardly warrant us in going to the extent we are asked to go in the case at bar. In the case cited, the bill under consideration was enrolled and properly signed by the speaker of the House, and attested by the chief clerk of that body. The signature only of the presiding officer of the Senate was omitted, the attestation of the secretary of the Senate being attached. It is held the failure of the presiding officer of the Senate to sign the bill, which the journal showed to have passed by the constitutional majority, would not affect the validity of the act. It may be presumed, say the court, that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same. The signature of the presiding officer of the House identified the bill and authenticated it as the measure which the legislative journals showed to have passed by the constitutional majority of votes. There was evidence contained in the enrolled bill and in the legislative journals, when considered together, which was deemed sufficient to warrant the governor in acting on the bill as the identical measure which the legislature had ²⁸⁹ acted upon and had passed by the requisite number of affirmative votes. If, therefore, we concede the soundness of the rule announced in the *Cottrell* case (9 Neb. 125, 1 N. W. 1008), it at once becomes apparent that in the case at bar the rule must be extended much further in order to uphold the law in question, and this, we are satisfied, we are not warranted in doing. Our inclination is to restrict rather than to enlarge on the rule therein announced. It is quite obvious in the present case that, without the certificates of the clerical officers of the two branches of the legislature to which we have alluded, there is nothing in the bill itself nor in the legislative journals from which it may be said that the amended House Roll No. 78, which the journals show to have passed both branches of the legislature by

a constitutional majority, is identical with, and contains the same matter as that of the purported act found among the enrolled bills in the office of Secretary of State and carried into the laws as chapter 157. There is an essential fact in the chain of evidence wholly wanting in order to authenticate and identify the act in question as having been constitutionally passed by both branches of the legislature, unless recourse be had to evidence outside of the enrolled bill itself and outside the legislative journals.

Section 11, article 3 of the constitution is in part as follows: "The presiding officer of each House shall sign in the presence of the House over which he presides, while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the legislature." The object of this provision of the fundamental law is at once manifest. It is the last act of the legislative branch of government in the promulgation of the laws enacted by that body. It is the mode prescribed by the constitution of authenticating measures which have been enacted into law and await only the action of the executive. It is, in the absence of evidence found in the journals disclosing the contents of a bill and the amendments thereto which are rarely if ever found in the legislative ²⁹⁰ journals, the only evidence of record authenticating the law as finally passed as being the same as that found in the enrolled bill. It is the only evidence which can be received, outside of the legislative journals, to prove that a bill has run the necessary course to become a law. It may be that a bill has been read in each House the requisite number of times, has received the requisite number of votes on its final passage, but until certified by the presiding officers of the two branches of the legislature as provided in the fundamental law, it cannot be promulgated as a law of the state. It lacks the authentication required to establish it as a legal statute. It is wanting in the constitutional evidence of its due and final enactment. The constitutional provision referred to cannot, we think, by any proper rule of construction be held to be merely directory and such as may be altogether disregarded. The affirmative declaration therein found as to the manner in which the due and final passage of an act shall be attested must, we are constrained to say, be construed as a declaration that such authentication is essential to the validity of an act, and without which it cannot be said to have the

force of law. In *State v. Kiesewetter*, 45 Ohio St. 254, 12 N. E. 807, it is held under a constitutional provision similar to our own that a bill not authenticated by the presiding officers of the legislature does not become a law. Say the court, in discussing both sides of the question: "On the other hand, the importance of furnishing to the people sources of information, certain in their character and convenient of access, as to what is and what is not law, is obvious. All are presumed to know the law, and it is of great interest to each citizen, as well as to the public officer, that there be some authentic record to which he may resort to ascertain certainly and definitely what laws are enacted by the legislature; what control him in the daily transaction of business, and of what, at his peril, he is bound to take notice. Whatever conduces to certainty in this regard, therefore, is of great moment to every person in the state, and no rule of construction ²⁹¹ would be wise which leaves so important a matter in doubt or confusion."

To the same effect is *Burritt v. Commissions of State Contracts*, 120 Ill. 322, 11 N. E. 180.

The conclusion deducible from the foregoing is that the act in controversy, for lack of due authentication, has failed to become a valid act of the legislature and is without the force and vitality of law. The act under consideration being inoperative, the writ applied for must be denied, which is accordingly ordered.

Writ denied.

Proof of the Enactment of Statutes is discussed in some of its aspects in the notes to *Carr v. Coke*, 47 Am. St. Rep. 814; *Jones v. Jones*, 51 Am. Dec. 616. As to proof of the signing of an act by the presiding officers of the legislature, see *Younger v. Hehn*, 12 Wyo. 289, 109 Am. St. Rep. 986. A marginal entry made in the bound volume of a legislative journal under instructions of the chief clerk of the house, after the journal has been filed with the Secretary of State, though honestly done and with the best motives, is an unlawful interpolation without legal effect to give vitality to the enactment of a statute: *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 85 Am. St. Rep. 42.

OMAHA NATIONAL BANK v. ROBINSON.

[73 Neb. 351, 102 N. W. 613, 104 N. W. 1070.]

JUDGMENTS—Validity—Jurisdiction.—A judgment rendered by a court without jurisdiction of the parties is absolutely void, and the supreme court stands upon no higher or different footing in this regard than a court of inferior jurisdiction. (p. 904.)

Hall & McCulloch, for the plaintiff in error.

W. H. Thompson, for the defendant in error.

352 LETTON, C. On May 4, 1895, in an action pending in the district court for Douglas county, one Edwin A. Robinson recovered a judgment against the Omaha National Bank. Robinson had died upon January 14, 1895, but his death was unknown to his attorneys. The bank prosecuted error to this court from the judgment. Gregory, Day & Day, who had been Robinson's attorneys in the action in the district court, entered his voluntary appearance in the supreme court, waiving the issuance and service of summons in error, and defended the case in this court. The error proceedings resulted in the reversal of the judgment, and the cause was remanded to the district court for further proceedings. In the district court the case was placed upon the trial docket and remained thereon until November 12, 1900, when, it appearing from the affidavit of J. H. McCulloch, one of the attorneys for the Omaha National Bank, that Robinson was dead, that no order of revivor had been made, and that more than one year had elapsed since such order could have been made, the action was stricken from the docket. The case remained in this condition until February, 1904, when a motion was made in behalf of the executors of Robinson to revive the original judgment in the district court. A conditional order of revivor was allowed, providing that, unless the defendant showed cause by March 14, 1904, the judgment should stand revived. The defendant made a return to this order to show cause by alleging the facts in regard to the death of Robinson, the reversal of the judgment and the action of the district court thereafter striking the case from the docket. Evidence was adduced, and at the hearing the district court sustained the motion for revivor and made it absolute. No motion for a new trial was filed. The plaintiff in error in its petition assigns: 1. The court

erred in sustaining the motion of this defendant in error for a revivor of said judgment; 2. The court erred in signing and directing the entry of the order reviving said judgment.

³⁵³ The first question presented is whether or not these assignments present any question for review, in view of the fact that no motion for a new trial was filed in the district court. In the view we take of the case it is not necessary to consider this assignment. We are of the opinion that the proceedings had in the supreme court were void. That the judgment of reversal was of no validity, nor was the mandate of any force. We have repeatedly said that a judgment rendered by a court without jurisdiction of the parties is absolutely void: *Ritchey v. Seeley*, 68 Neb. 120, 93 N. W. 977, 94 N. W. 972, 97 N. W. 818. The supreme court stands upon no higher or different footing in this regard than a court of inferior jurisdiction. The case falls squarely within the rule of *Ritchey v. Seeley*, and the district court was right in disregarding the proceedings had in this court when it had never acquired jurisdiction: *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97; *Eayrs v. Nason*, 54 Neb. 143, 74 N. W. 408; *Johnson v. Parrotte*, 46 Neb. 51, 64 N. W. 363; 1 Black on Judgments, sec. 170. No question is made as to the validity of the original judgment, and no sufficient cause was shown why it should not be revived.

We recommend that the judgment of the district court be affirmed.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A Judgment without Jurisdiction is void, and may be contested or denied in any proceeding, direct or collateral: *Thornily v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959; *Sache v. Wallace*, 101 Minn. 169, 118 Am. St. Rep. 612.

HARNETT v. HOLDREGE.

[73 Neb. 570, 103 N. W. 277.]

BILLS AND NOTES—Indorsers in Blank.—One who puts his name in blank on the back of a note, payable to the maker or order, before it is negotiated, and before it is indorsed by the maker, is an indorser and not a joint maker, if, when negotiated, the maker's name appears first on the back of the note, and his liability cannot be varied by parol evidence. (pp. 908, 909.)

BILLS AND NOTES—Indorsers in Blank—Evidence to Vary Liability.—One who signs his name in blank on the back of a note, made payable to the order of the maker, which is afterward indorsed by the payee and delivered to a third person, is liable as an indorser and not as a joint maker, and parol evidence of a custom pursued by the maker with regard to other notes of the same kind is not admissible to show inferentially that such indorser was a joint maker. (p. 912.)

J. E. Kelby, R. D. Brown, J. W. Deweese and F. I. Foss, for the defendant in error.

J. H. McIntosh, J. J. Sullivan and F. A. Brogan, for the plaintiff in error.

570 BARNES, J. When this case was before us the first time it was heard by department No. 2 of the commission, and an opinion was written, and approved by the court, affirming the judgment below: 5 Neb. (Unof.) 114. A rehearing was allowed and a reargument had before the court. On such rehearing some fault was found with the statement of facts contained in our former opinion. However, the principal criticism was that the indorsement, "For value received we hereby guarantee the payment of the within note, and waive presentment for payment, demand and notice of **571** protest," was stamped twice on the two thousand dollar note in suit, and only once on the one for five thousand dollars; yet such indorsement appeared twice on the copy of the five thousand dollar note which is set out in the opinion. While the point appears to be well taken, a re-examination of the notes shows us that the indorsement appears on both notes under the name of the maker, the payee, and above the signatures of the defendants F. I. Foss, G. W. Holdrege and J. W. Deweese, who are the only ones sought to be held liable in this action. It would therefore seem that the variance is not only immaterial, but is extremely trifling. This explanation, taken with the full and complete statement con-

tained in our former opinion, to which reference is hereby made, renders any further statement unnecessary for a proper understanding of the present decision.

Counsel for the plaintiff in error vigorously assail that part of our former opinion which holds that the defendants above named were liable only as indorsers of the notes in question, for the reason that the liability incurred by them is the pivotal question in this action. It is conceded that if they are to be treated as indorsers, then our former opinion should be adhered to, and the judgment of the district court must be affirmed. Plaintiff insists, however, that they are not indorsers, but are joint makers of the notes, and should be held liable as such. To sustain this contention counsel point to the statement contained in the amended petition, "that the defendants borrowed the money (sought to be recovered herein) from the plaintiff's intestate on said notes." No other facts are alleged in the amended petition from which such a liability can be inferred, and it may be stated in passing that the evidence not only fails to sustain the allegation, but it would seem that the corporation, the maker of the notes, borrowed the money and received the proceeds of the transaction. In fact it is alleged in the original and amended petitions that the South Fork Irrigation and Improvement Company made the notes, and the defendants Foss, Holdrege and Deweese wrote their names on the back of those instruments; and ⁵⁷² both petitions charge them with the liability of indorsers in clear and explicit terms, even to the proper allegation of demand, protest and notice of protest. So we will again consider the question as to what was the liability assumed by the defendants, by writing their names on the back of these notes. It must be remembered that they were made by the South Fork Irrigation and Improvement Company (a corporation), payable two years after date to its own order, and indorsed as follows: "The South Fork Irrigation & Improvement Co., By G. W. Holdrege, Pt., By A. L. Emerson, Sec'y & Tr." Then followed: "For value received, we hereby guarantee the payment of the within note and waive presentment for payment, demand and notice of protest. F. I. Foss, G. W. Holdrege, C. H. Peck, W. L. Matson, A. L. Emerson, J. W. Deweese."

It is claimed by the defendants that the waiver above quoted was not on the notes when they indorsed them, and

that such waiver was placed there after they signed their names thereon, without their knowledge or consent; that the notes and their liability thereon were thus materially altered and changed, and were not the contracts signed or indorsed by them. After an examination of the evidence we are unable to say that it is insufficient to support this claim. No evidence was offered by the plaintiff tending to prove his allegations of demand, protest and notice of protest, and as we are required to hold that no waiver was established, the case must turn on the nature of the liability of the defendants under the facts above stated. It is perhaps well to state that while the South Fork Irrigation and Improvement Company, Fayette I. Foss, W. L. Matson, George W. Holdrege, A. L. Emerson, C. H. Peck and Joel W. Deweese, were all alleged against in the petition, yet the case proceeded against the defendants Foss, Holdrege and Deweese alone. One of the earliest cases in which the question of the liability of one who signs his name on the back of a promissory note, made payable to the order of the maker, indorsed by him and delivered to a third person, arose, was *Lake v. Stetson*, decided by the supreme judicial court of Massachusetts (13 Gray (Mass.), 310, note). In that case it appeared that one Stetson made a note payable to his own order, on which one Bates had written his name, after which Stetson indorsed it and delivered it to the plaintiff Blake. The trial court rejected the evidence offered by the plaintiff that the note was given by the defendants Stetson and Bates as a part of the consideration of a joint purchase by them, and that the note and all of the signatures thereon were made at one interview, and before the delivery of the note, in order to charge both defendants as joint makers. A verdict was given for the defendant Bates, and the plaintiff prosecuted his exceptions, which were overruled by the supreme court.

The question next came before that learned court in the case of *Bigelow v. Colton*, 13 Gray (Mass.), 309, 74 Am. Dec. 633. The following is a copy of the note sued on:

“Great Barrington, July 18, 1857.

“Two months after date I promise to pay to the order of myself, two hundred and fifty dollars at the Mahaiwe Bank, for value received.

“EDWIN HURLBUT.”

Upon the back of the note was the signature of Hurlbut, and under it that of Colton. At the trial it appeared that both names were signed before the delivery of the note to the plaintiff, the signature of Hurlbut being made first. At the trial the judge ruled that the defendant could not be held as a maker, and directed a verdict for him, which was returned, and the plaintiff alleged exceptions. The supreme court affirmed the judgment, and held that one who puts his name, before delivery, on the back of a promissory note, payable to the maker or order, and indorsed by the maker, is an indorser and not a joint maker, and his liability cannot be varied by parol evidence. We quote from the opinion as follows: "A promissory note payable to the order of the maker, and by him indorsed, is in legal effect a note payable to bearer. By placing his name on the back of the note, the ⁵⁷⁴ maker agrees to pay it to whomsoever may be the holder thereof: Story on Notes, secs. 16, 36a. Although a note payable to bearer is transferable by delivery, it may also be transferred by the indorsement of any holder. In such case, the indorser incurs the same obligations and liabilities as an indorser of a note payable to order, and is entitled to demand and notice: Story on Notes, sec. 132."

In *Clapp v. Rice*, 13 Gray (Mass.), 403, 74 Am. Dec. 639, *Lake v. Stetson*, 13 Gray (Mass.), 310, and *Bigelow v. Colton*, 13 Gray (Mass.), 309, 74 Am. Dec. 633, were followed, and it was held that parties who indorse their names on a promissory note before its delivery, for the benefit of the maker, are not liable as joint makers, if the payee afterward indorses his name above theirs before the note is delivered, and other parol evidence is inadmissible to show that they were joint makers. We append the following quotation from the body of the opinion in that case: "When this note was first passed to any holder for value, so as to make it a valid contract, it was indorsed by W. T. Davis, treasurer, to whose order it was payable. It was therefore never a contract by which the plaintiffs were holden to Davis or to the railroad company. Their names were put upon it, with the obvious understanding and expectation that it would be indorsed by Davis before it should be negotiated. By his indorsement above their names, it was made, in form and effect, an indorsed note, with successive indorsements following. The bank took it in this form, complete and effectual, when it first had any validity; and it has been settled in

the recent case of *Prescott Bank v. Caverly*, 7 Gray (Mass.), 217, 66 Am. Dec. 473, that under such circumstances it is not competent for the person whose name appears upon the note as an indorser, to show, by parol evidence, that his contract was different from that which such a signature ordinarily imports."

About the same time the question was before the supreme court of Maine, where the same rule was announced: *Smalley v. Wight*, 44 Me. 442, 69 Am. Dec. 112. The question was again before the supreme court of Massachusetts in *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 335. The court followed the ⁵⁷⁵ cases above cited, and held: By the law of this commonwealth, one who puts his name on the back of a promissory note, payable to the maker or order, before it is negotiated, and before it is indorsed by the maker, is an indorser, and not a joint maker if, when negotiated, the maker's name appears first on the back of the note. We quote from the opinion: "The liability of a party whose name appears on the back of a negotiable note is determined by the position of his signature with reference to other parties at the time when the note first takes effect by delivery. When a note is payable to the maker's own order it can take effect only when indorsed and delivered by him. The fact that the defendant put his name on the back of the note before it was indorsed by Shurtleff does not make him a joint promisor, because he then knew that it must be indorsed by the maker before it could be negotiated, and the implication is that he intended to be liable only as indorser."

The question came before the supreme court of Illinois in *Bogue v. Melick*, 25 Ill. 91, where it was held that a promissory note, payable to one of the makers, while in the hands of the payee, is a nullity, and can never become operative except by indorsement of the payee, and that the position of the names of the parties on the back of the note will be notice to anyone purchasing the same of the extent of their rights and liabilities. It was further held that one who writes his name on the back of such a note incurs the liability of a second indorser.

In *Blatchford v. Milliken*, 35 Ill. 434, we find the following: "It is the settled law of this state that a person who is not a party to a promissory note which is to become a valid obligation against the maker upon its delivery to the payee, by writing his name in blank upon the back of the note, is

presumed to assent to the obligation of a guarantor. But where the note creates no valid obligation against the maker, and can create none, until it is ⁵⁷⁶ indorsed and transferred by the payee, the presumption is that a person writing his name in blank upon the back of the note assumes the obligation of an indorser. Inasmuch as the note can never have any validity until the name of the payee appears upon it as an indorser, the person writing his name in blank upon the note understands that, when the note takes effect, his name will appear upon it as a second indorser, and it is reasonable to conclude that such was the position which he intended to occupy. All persons receiving a note thus payable and so indorsed are apprised of the apparent obligations of the indorsers, and if they rely upon any other obligation, it is their duty to ascertain whether it exists. Any other obligation is *dehors* the instrument. An authority to fill out an undertaking over a signature is to be exercised consistently with the nature of the instrument and the intention of the parties. From the nature of a note payable to the maker's own order, it is known what the law will presume was the intention of the parties in indorsing it in blank; and if any agreement is written over the signature inconsistent with such presumption, it is the duty of the persons receiving the note to ascertain how and by what authority it was written there."

In *Kayser v. Hall*, 85 Ill. 511, 28 Am. Rep. 624, it was held: "Where a promissory note, made payable to the maker, is indorsed by him, and another person indorses his name just below the first, and the note is then negotiated, the person last indorsing will assume the liability of second indorser, and not that of guarantor. A promissory note payable to the order of the maker has no validity until it is indorsed and transferred by him."

In *Heidenheimer v. Blumenkron*, 56 Tex. 308, it appeared that a promissory note was made by Blumenkron, payable to the order of himself, and indorsed by one Hirsch and others, and it was held that on the face of the note, as indorsed and delivered, Blumenkron was the maker and Hirsch and the other were indorsers. It was said: ⁵⁷⁷ "The fact that Hirsch became a party to the note in its inception and for the accommodation of Blumenkron did not make him liable otherwise than as an indorser; nor is parol evidence admissible to show the intention with which he signed."

The question was again before the supreme court of Texas in *Williams v. Merchants' Nat. Bank*, 67 Tex. 606, 4 S. W. 163. It appears that Williams made a promissory note for twelve thousand five hundred dollars, payable to the order of himself, at the office of the Gainesville National Bank, with interest from maturity until paid, at the rate of twelve per cent per annum. The note was signed by Williams, indorsed by him, and delivered to the Gainesville National Bank, after it had been indorsed by one Washington. In a suit in which it was sought to hold all the parties as joint makers, it was held: "Their names appearing after the payee, it must be presumed that the indorsers signed after the payee had indorsed, and parol evidence cannot be admitted to vary the plain terms of such a contract."

In our former opinion, the case of *First Nat. Bank v. Payne*, 111 Mo. 291, 33 Am. St. Rep. 520, 20 S. W. 41, was made the leading case for comment, and that decision has been vigorously assailed by the plaintiff. A re-examination of the opinion in that case impresses us with the learning and ability of the supreme court of that state. The decision is in line with the other decisions of that court on the same question, and follows the early Massachusetts cases, and others from which we have so liberally quoted. This rule has also been recognized in *Little v. Rogers*, 1 Met. (Mass.) 108, and in *Clafin Co. v. Feibelman*, 44 La. Ann. 518, 10 South. 862, and seems to be the rule adopted by the English courts: *Hooper v. Williams*, 2 Ex. 13. Indeed, this rule is so well established that it is stated without qualification in *Daniel on Negotiable Instruments*, sections 130, 707a; in *Tiedeman on Commercial Paper*, section 20, and in 2 *Parsons on Notes and Bills*, second edition, 122. It is approved in *Burton v. Hansford*, 578 10 W. Va. 470, 27 Am. Rep. 571, and by the supreme court of the United States in *Rey v. Simpson*, 22 How. (U. S.) 341, 16 L. ed. 260.

Plaintiff has failed to call our attention to a single case in which any court has held that one who signs his name in blank on the back of a promissory note, made payable to the order of the maker, and which is afterward indorsed by the payee and delivered to a third person, is liable as a joint maker. And after the most thorough research we have been unable to find but one such case, to wit, *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 60 Am. St. Rep. 719, 45 N. E. 1094, 35 L. R. A. 786, which seems to support plain-

tiff's contention. As opposed to the authorities above cited and quoted from, plaintiff cites *Salisbury v. First Nat. Bank*, 37 Neb. 872, 40 Am. St. Rep. 527, 56 N. W. 727, and insists that that case, with a long line of decisions from other states, together with *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341, hold a contrary doctrine. An examination of *Salisbury v. First Nat. Bank*, 37 Neb. 872, 40 Am. St. Rep. 527, 56 N. W. 727, discloses that the note there sued on was as follows:

“\$2,500.

OMAHA, Neb., Feb. 15, 1889.

“Ninety days after date, we, or either of us, promise to pay to the bank of Omaha, or order, Twenty-five hundred and no-100 dollars, for value received, payable at the Bank of Omaha, Omaha, Neb., with interest at the rate of 10 per cent. per annum from maturity until paid.

“C. H. SLOMAN.”

Across the back of this note was written the names of J. G. Salisbury and S. A. Sloman, and before maturity it was indorsed and transferred by the bank of Omaha to the bank of Cambridge. In a suit against the maker and the indorsers it was held that they were liable as joint makers. It is only necessary to compare the notes in question in this case with the one just quoted to show that *Salisbury v. First Nat. Bank*, 37 Neb. 872, 40 Am. St. Rep. 527, 56 N. W. 727, is not authority in this case. A careful examination of *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341, and the whole list of twenty-odd cases cited by counsel shows that the notes in question therein were ⁵⁷⁹ made payable to third persons, indorsed in blank, and afterward indorsed and negotiated by such third persons; and in none of the cases, so far as we have been able to ascertain, was the note in suit made payable to the order of the maker himself.

So we conclude, not alone from the weight of authority, but from all of the authorities on the question in this country, that the defendants Foss, Holdredge and Deweese must be held to have assumed the liability of indorsers only, and that under the issues in this case, and according to the principles above discussed, parol evidence cannot be received to charge them with any other, or an enlarged liability. It follows, then, that the district court did not err in excluding the evidence by which it was sought to show, inferentially, by a custom or course of business on the part of the maker in regard to other transactions that the defendants were not indorsers, but were joint makers of the notes.

A re-examination of the pleadings convinces us that our former holding as to their legal effect, and the issues raised thereby, is correct; and we decline to give that matter any further consideration.

It is again urged that, in any event, judgment should have been rendered against the defendant Holdrege. And this contention is based on the fact that he was not present at the trial in person, and did not testify in his own behalf. This point does not merit our serious consideration. It is sufficient to say that the evidence of his codefendants made at least a *prima facie* defense for him, which was not assailed or overthrown by the plaintiff.

For the foregoing reasons, our former opinion is adhered to, and the judgment of the district court is affirmed.

The Effect of Writing One's Name on the Back of a Note before delivery is discussed in the note to *Cadwallader v. Hirshfeld*, 72 Am. St. Rep. 676. In some jurisdictions a person so signing is regarded as a maker: *Dow Law Bank v. Godfrey*, 126 Mich. 521, 86 Am. St. Rep. 559; *Camp v. First Nat. Bank*, 44 Fla. 497, 103 Am. St. Rep. 173; *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573.

STATE v. SHRADER.

[73 Neb. 618, 103 N. W. 276.]

APPEAL—Waiver of Objections.—A motion to dismiss a petition in error on account of an omission to file a motion for a new trial in the trial court is a waiver of any objection to the sufficiency of the summons in error. (p. 914.)

APPEAL—Omission to File Motion for New Trial in the lower court is not fatal to appellate jurisdiction. (p. 914.)

HABEAS CORPUS—New Trial.—A trial court has no jurisdiction to grant or entertain a motion for a new trial in habeas corpus proceedings. (p. 914.)

HABEAS CORPUS—Remand to Custody.—A prisoner given his liberty under habeas corpus proceedings may, upon reversal of the order by an appellate court, be remanded to custody. (p. 915.)

HABEAS CORPUS—Defective Complaint.—A prisoner will not be set at liberty by writ of habeas corpus simply because the complaint, on account of which he is held in custody, states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention. (p. 916.)

J. C. Watson, E. F. Warren and W. Hayward, for the plaintiff in error.

N. Brown, attorney general, W. T. Thompson, W. B. Rose and A. A. Bischoff, for the defendant in error.

⁶¹⁸ AMES, C. The plaintiff in error was arrested upon a criminal warrant issued by the county judge of Otoe county. The complaint charged that he had sold and conveyed certain lands lying in that county, without having title thereto "either by law or equity, by descent, devise or by written ⁶¹⁹ contract or deed of conveyance, with intent to defraud" the owner thereof. The statute provides a punishment for selling or conveying any tract of land "without having a title to the same by descent, devise or evidence, by a written contract or deed of conveyance, with intent to defraud." It will be observed that there is a variance between the complaint and the statute, consisting of the omission from the former of the words, "or evidence." Because of this variance the accused contended, and contends, that the complaint is void, and procured his discharge from the custody of the sheriff, by whom he had been arrested upon the warrant, by means of a writ of habeas corpus sued out of the county court. From the order of discharge the sheriff prosecuted a petition in error to the district court, which rendered a judgment of reversal, and made an order remanding the accused to the custody of the officer. From the judgment and order, proceedings in error are prosecuted in this court. The record recites that the accused appeared specially in the district court and moved that the summons in error be quashed for informality, and, after that motion was overruled, moved that the petition in error be dismissed because of failure to file a motion for a new trial in the county court. The latter motion was also overruled. It is clear that the second motion was a waiver of the first, and it seems to us equally clear that the ruling on the second was correct. Even if it be conceded that a motion for a new trial in the county court was requisite, omission to file one would not deprive the district court of jurisdiction of the petition in error, but, at most, would limit the scope of the inquiry upon that petition. In such a case omission of the motion might work an affirmance of the judgment of the county court, but it would not require a dismissal of the proceeding in error. But counsel for plaintiff in error have

called our attention to no statute, and we know of none, authorizing the county court to grant or entertain a motion for a new trial in such cases. Without such a motion the error proceeding would present ⁶²⁰ nothing not otherwise disclosed upon the face of the record. Apparently no evidence was offered in either court, and although the district court expressly granted leave and time for the preparation and settlement of a bill of exceptions, none was ever made.

There are several formal assignments of error in this court which amount to no more than a single complaint that "the judgment of the district court is contrary to law," and are so vague as doubtfully to be entitled to consideration here. But the contentions chiefly urged in the brief of counsel are two: 1. That the complaint upon which the arrest was made fails to charge an offense under the statute; and 2. That the accused having been set at liberty by the county court, he is protected by the constitution and the statute from subsequent arrest or imprisonment under the judgment and order of the district court. If the second contention is upheld, the statutory right of review would never be available except to the accused, an intention which is not expressed by its language; and it seems to be well settled both upon principle and by authority that the plaintiff in error was not put in jeopardy by the habeas corpus proceeding in the county court in a sense that entitles him to the protection of the guaranties invoked. The nature of the proceeding cannot, perhaps, be better described than in the language of Mr. Chief Justice Waite in *Ex parte Tom Tong*, 108 U. S. 556, 2 Sup. Ct. Rep. 871, 27 L. ed. 826, as follows: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty, notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is ⁶²¹ a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against

those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution": *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

As to the first contention it seems to be well settled that a prisoner will not be set at liberty by a writ of habeas corpus because the complaint, on account of which he is held in custody, states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention. To hold otherwise would be not only to adapt the writ to the ordinary uses of a proceeding in error, but to warrant, by its means, intolerable interference with the ordinary and regular process of criminal prosecutions: *Ex parte Kowalsky*, 73 Cal. 120, 14 Pac. 399; *Ex parte Prince*, 27 Fla. 196, 26 Am. St. Rep. 67, 9 South. 659; *Ex parte Whitaker*, 43 Ala. 323; *Parker v. State*, 5 Tex. App. 579; *Emanuel v. State*, 36 Miss. 627; *Ex parte Watkins*, 3 Pet. (U. S.) *193, 7 L. ed. 650; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Matter of Eaton*, 27 Mich. 1; *Ex parte Kitchen*, 19 Nev. 178, 18 Pac. 886; *In re Marshall*, 6 Idaho, 516, 56 Pac. 470; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 1046.

We do not, however intend to intimate an opinion as ⁶²² to whether or not the complaint in this case is so far defective as to be subject to successful assault by demurrer or motion but unquestionably it charges, substantially, that the accused sold and conveyed, with intent to defraud, land of which he had no real or apparent title at law or in equity.

We recommend that the judgment of the district court be affirmed.

Letton and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

In Habeas Corpus Proceedings the indictment under which the petitioner is held or convicted will not be examined further than to determine whether it charges a public offense: See the notes to Koepke v. Hill, 87 Am. St. Rep. 185, 186; State v. Smith, 100 Am. St. Rep. 35.

HERRICK v. HUMPHREY HARDWARE COMPANY.

[73 Neb. 809, 103 N. W. 685.]

TROVER AND CONVERSION—Shares of Corporate Stock.—Trover will lie for the wrongful conversion of shares of corporate stock. (p. 920.)

TROVER AND CONVERSION—Shares of Corporate Stock.—Any act of dominion wrongfully exercised over another's property, in denial of his right or inconsistent with it may be treated as a conversion, and this rule applies to shares of corporate stock. (p. 920.)

CONVERSION OF CORPORATE STOCK.—If, under its by-laws or a statute, it is necessary that a transfer of its stock be made on the books of a corporation, and it wrongfully refuses to make such transfer, such refusal is a conversion of the stock. (p. 921.)

CORPORATIONS.—Powers of Corporations in Affecting Their Objects are as broad and comprehensive as those of an individual when not expressly prohibited. (p. 922.)

CORPORATIONS—Shares of Stock—Transfer of.—Although shares of corporate stock are not, strictly speaking, negotiable instruments, yet they partake of the qualities of a negotiable security to such an extent that they pass from indorser to indorsee shorn of all secret liens against the stock in the hands of the original owner. (p. 922.)

CORPORATIONS—Lien on Its Stock.—At common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company, and such a lien will not be enforced, unless created by statute, charter or by-law. (p. 922.)

Wilson & Brown, for the plaintiff in error.

C. O. Whedon, for the defendant in error.

810 OLDHAM, C. This was an action for damages for the unlawful conversion by the defendant hardware company of ninety-nine shares of its capital stock. The petition, after alleging the incorporation of the defendant company, charged that on the second day of May, 1902, the defendant executed and delivered to one Francis B. Chap-

man a certificate evidencing his ownership of ninety-nine shares of the capital stock of the defendant company, of the value of one hundred dollars each; that the certificate of stock was in the following language: "This certifies that Francis B. Chapman is the owner of ninety-nine shares, of one hundred dollars each, of the capital stock of the Humphrey Hardware Company transferable only on the books of the corporation by the holder hereof in person or by attorney, upon the surrender of this certificate properly indorsed"; that on the thirtieth day of May, 1903, the plaintiff purchased said shares of the capital stock of the defendant company, evidenced by said certificate, and became the owner thereof; that on the ⁸¹¹ same day the plaintiff presented said certificate of stock to the defendant and to its president and its secretary and treasurer, and demanded of them the transfer of said stock upon the books of the defendant, and demanded the issue of a certificate to her evidencing her ownership, and then and thereby offered to surrender to defendant its original certificate of stock that had been issued to said Chapman and by him duly indorsed to the plaintiff; that the articles of incorporation of the defendant company contained the following provision: "Transfers of capital stock shall not be notice to the corporation unless a minute of such transfer shall be entered on the stock ledger"; that the by-laws contained a provision that "the secretary shall keep a record of the transfers of the capital stock of the corporation." The petition then alleges that the defendant, its president and secretary refused to accept the surrender of the old certificate, and refused to register the transfer of the shares to the plaintiff upon the books of the company, or to issue new shares in lieu of the old. and by such wrongful act denied plaintiff the right to participate in the affairs of the corporation as a stockholder. and converted the stock evidenced by the certificate, which she had purchased from Chapman, to its own use. And said defendant and its officers based their refusal to so transfer said shares and issue to her a certificate therefor upon the sole ground that said Francis B. Chapman was indebted to said defendant in the sum of about two hundred and eleven dollars, and that defendant had a lien on said stock for said sum. And the plaintiff alleges that neither the articles of incorporation of the defendant nor its by-laws provided for any such lien or contained any provision whatever on that

subject. The petition prayed for a judgment for nine thousand nine hundred dollars, the par value of the stock said to be converted. The defendant filed an answer to this petition, admitting that it was a corporation, and admitting that on the second day of May, 1902, it delivered the said certificate of stock to Chapman as alleged in the petition, and admitting that the business of the corporation was to some ⁸¹² extent under the direction of its president and secretary. The answer then pleads an alleged lien on the certificate of stock, purchased by the plaintiff, to secure an indebtedness of two hundred and eleven dollars owed by said Chapman to the defendant company; that this lien existed by virtue of a written instrument, as follows:

“Dec. 1, 1902.

“The Humphrey Hardware Co., Lincoln, Neb.

“I desire to place in the hands of the stockholders of the Humphrey Hardware Co. my honorable resignation as manager of this incorporation. The same to take effect immediately, Jan. 1st, 1903. All of my interest in the incorporation I turn over to Myron E. Wheeler, Secy. & Treas. of the incorporation. Thanking the stockholders in this incorporation for their consideration, and wishing them abundant success in the future, I remain,

“Very respectfully,

“FRANCIS B. CHAPMAN,

“Manager H. H. Co.”

The answer further denies every allegation not specifically admitted, and also pleads defect of the parties plaintiff. Plaintiff by way of reply specifically denied any notice of the alleged lien of the defendant on the shares of stock, either at or before time of purchase, and denied each and every allegation in the answer which did not confess the allegations of the petition. On the issues thus joined a jury was impaneled, and the trial commenced. The defendant objected to the introduction of any testimony offered by the plaintiff, because the petition failed to state a cause of action in favor of the plaintiff against the defendant. The trial court sustained the objection, and ordered that the jury be discharged from further consideration of the case, and it was “considered and adjudged by the court that the action be, and hereby is, dismissed at the cost of the plain-

tiff. To which the plaintiff duly excepts." To reverse this judgment plaintiff brings error to this court.

⁸¹³ But one question is presented for determination by this record, and that is whether or not the petition of the plaintiff, or, more properly speaking, the petition, answer and reply raise an issue which shows a right of recovery in the plaintiff against the defendant for the conversion of her shares of capital stock in the corporation by the refusal of its officers to register the transfer of such stock on the books of the company, or to issue a new certificate of stock in lieu of the old one which she offered to surrender. A certificate of stock in a corporation is not the stock itself, but rather the evidence of the holder's ownership of the stock, and of his rights as a stockholder to the extent therein specified. "They are," as said by Clark and Marshall on Private Corporations, section 378a, "muniments of title, but not the title itself; much less the real property." When plaintiff purchased the shares of stock in dispute from Chapman, and received the certificate from him properly indorsed, she then became possessed of the evidence of the right to be a stockholder in the corporation, and to enjoy all the privileges and immunities of a stockholder to the extent of the stock, and, as between herself and Chapman, she was the owner of the stock. In an early case (*Neiler v. Kelley*, 69 Pa. 403) it was held that, because of the fact that shares of stock are intangible personal property, trover would not lie for the conversion of the stock, although it might lie for the conversion of the certificate. The decision dealt with so many judicial niceties that it found no favor either with the courts generally or with the text-writers; and it is now almost universally held that the action will lie for the conversion of the stock itself, as well as for a conversion of the certificate which evidences it: *McAllister v. Kuhn*, 96 U. S. 87, 24 L. ed. 615; *Anderson v. Nicholas*, 28 N. Y. 600; *Jarvis v. Rogers*, 15 Mass. *389; *Ayres v. French*, 41 Conn. 142; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548; *Carpenter v. American B. & L. Assn.*, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95.

Any act of dominion wrongfully exercised over another's property in denial of his right or inconsistent with it may ⁸¹⁴ be treated as a conversion. And this is as true of shares of stock as it is of any other property: 2 Clark and Marshall

on Private Corporations, sec. 379b, and the cases there cited. A conversion of the stock may be by a third party or by the corporation itself. When under its own by-laws, or under a statute, it is necessary that the transfer of the stock be made on its books, and the corporation wrongfully refuses to make the transfer, such refusal is a conversion of the stock: *Bond v. Mt. Hope Iron Co.*, 99 Mass. 505, 97 Am. Dec. 49; *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337; *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10, 35 L. R. A. 306.

Now, it appears clearly from the allegations of the petition that under the articles of incorporation and the by-laws of the defendant company, as well as by the provisions of the stock certificate itself, the shares of stock in controversy were transferable only on the books of the corporation upon the surrender of the certificate properly indorsed, and that the company would not recognize a transfer of stock not entered on its books. It is urged; however, by the counsel for defendant in error that under the statutes and the constitution of Nebraska plaintiff was not denied any substantial right by defendant's refusal to register the transfer of the stock on its books and to reissue the stock, and he cites in support of this contention so much of section 124, chapter 16, of the Compiled Statutes of 1903 (Ann. Stats., 4117), as provides: "Every corporation, as such, has power: Fifth, to render the interest of the stockholders transferable"; and also section 125 of the same chapter, which provides: "The powers enumerated in the preceding section shall vest in every corporation in this state, whether the same be formed without or by legislative enactment, although they may not be specified in its charter, or as articles of association." He cites so much of section 5, article 11b of the constitution, as declares: "The legislature shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder shall (have) the right to vote in person or proxy, for the number of shares of stock owned by him," §15 etc. Now, the question arises, are the conditions of the certificate and the provisions of the by-laws of the defendant company, which require the assignment of stock certificates to be entered on the books of the company, in conflict with these provisions? We think that they are not. The statute provides for and authorizes corporations to make the shares of their stock trans-

ferable, and the by-laws and the stock certificates of the defendant were issued to carry this provision into effect. The constitution provides that every stockholder shall have a right to vote the shares of stock owned by him at the elections of directors, but it does not provide that every owner of stock, as distinguished from every stockholder, shall have this right. The powers of a corporation in effecting its objects are as broad and comprehensive as those of an individual when not expressly prohibited: *Thompson v. Lambert*, 44 Iowa, 239. The object of having transfers of stock recorded upon the books of the company is to give the company notice of whom its stockholders are. Ordinarily, the officers of the company in conducting the elections or distributing dividends will not look behind the books to ascertain who are the real owners of the stock: *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007; *In re Argus Printing Co.*, 1 N. Dak. 434, 26 Am. St. Rep. 639, 48 N. W. 347, 12 L. R. A. 781; *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174. We therefore conclude that the refusal of the defendant to register the transfer of the plaintiff's stock on its books, or to issue new stock in lieu thereof, amounted to a denial of a substantial right, and was, if done wrongfully, a conversion of the stock.

While it is true that shares of stock are not, strictly speaking, negotiable instruments, yet they partake of the qualities of a negotiable security to such an extent that they pass from indorser to indorsee shorn of all secret liens against the stock in the hands of the original owner: *Keller v. Eureka Brick Machine Mfg. Co.*, 43 Mo. App. 84, 11 L. R. A. 472. It was said in the recent case of *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80, 106 Am. St. Rep. 340, 101 N. W. 735: "At common law a corporation has no lien upon the ⁸¹⁶ shares of its stockholders for debts due from them to the company, and, secret liens being discouraged, such a lien will not be enforced, unless created by statute, charter, or by-law."

Both our statutes and the by-laws of this company are silent on the right to create a lien for indebtedness of one of the officers to the corporation. The corporation in this case, according to the admitted allegations of the petition, has made no such provision, and, in any event, to make this defense effective it must be established that the plaintiff bought

with notice of the lien: *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

We are therefore of opinion that the trial court erred in refusing to admit any testimony offered by plaintiff under her petition, and we recommend that the judgment of the court be reversed and the cause remanded for proceedings in accordance with this opinion.

Ames and Letton, CC., concur.

By the COURT. For the reasons given in the above opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

On Conversion of Personal Property sufficient to sustain trover, see the note to *Bolling v. Kirby*, 24 Am. St. Rep. 795. A corporation refusing to transfer its stock to a purchaser and issue a new certificate thereof is liable for conversion: *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316. And if a man transfers an account with a stock broker from his own to his wife's name, she may maintain an action for trover and conversion against the broker, in case he, without notice to her, sells securities in the account for the husband's debt: *Sparks v. Hurley*, 208 Pa. 166, 101 Am. St. Rep. 926.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

COGGINS v. AETNA INSURANCE COMPANY.

[144 N. C. 7, 56 S. E. 506.]

INSURANCE.—The Iron-safe Clause in a Policy of Insurance is upheld as a reasonable contract of limitation on the risk which should be properly borne by the insurer. (pp. 925, 926.)

INSURANCE.—In Construing the Iron-safe Clause, it should receive a reasonable interpretation, and only substantial compliance should be required. (p. 926.)

INSURANCE—Breach of the Condition Requiring an Inventory to be Kept.—Where, if the assured furnished all the data in his possession, but from such data it is not possible to supply the information required to make an inventory of the goods in his store, there can be no doubt that he has not complied with the condition in his policy requiring him to take a complete, itemized inventory of stock on hand at least twice in each year. (p. 928.)

INSURANCE, Entirety of Contract.—Where the Building and Goods Therein are insured against loss by fire, and the policy contains what is known as the iron-safe clause and the clause requiring the keeping of an inventory, and there is such a breach that the insured is not entitled to recover for the loss of the goods, he is precluded as well from recovering from the destruction of the building, though, in the policy, the premium being entire, there is a definite sum specified for the building and another for the goods. (p. 929.)

INSURANCE, Test of the Entirety of a Contract of.—Where the premium paid is entire, and every risk which can attend the one class of property also attends the other, the same rule must be applied to both, and the breach of condition as to one class of property precluding a recovery for its loss also precludes a recovery on account of the property of the other class. (pp. 929, 930.)

Action on a policy insuring against loss by fire of a building and its contents consisting of a general stock of merchandise intended for sale. The plaintiff had two stores, one at Fernhurst and the other at Erastus. He procured a policy on the latter, designating two hundred dollars as the risk on the building and fifteen hundred dollars on the goods therein. On motion of the defendant, the action was dis-

missed as on a judgment of nonsuit, and the plaintiff appealed.

Walter E. Moore, Shepherd & Shepherd and Coleman C. Cowan, for the plaintiff.

Merrick & Barnard and King, Spalding & Little, for the defendant.

¶ HOKE, J. Defendant resists recovery in this case by reason of alleged breach of certain stipulations of the policy comprehended ⁹ under the general term, "the iron-safe clause." These stipulations, as contained in the present policy, are as follows:

"1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

"2. The assured will keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of his policy.

"3. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

And the breach assigned is for violation of the first and second items of the clause; to wit, that the insured made no inventory and kept no books as required by these provisions of the contract.

This "iron-safe clause," frequently attached to policies of insurance, has been very generally upheld by the courts as

a reasonable contract limitation on the risk which should be¹⁰ properly borne by the company: *Southern Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821, 52 L. R. A. 70; *Sowers v. Mutual F. Ins. Co.*, 113 Iowa, 551. 85 N. W. 763; *Lozano v. Palatine Ins. Co.*, 78 Fed. 278, 24 C. C. A. 85; *Liverpool etc. Ins. Co. v. Kearney*, 94 Fed. 314. 36 C. C. A. 265.

These decisions and the reasons given to support them are, we think, well considered, and the clause, therefore, when properly made a part of the contract of insurance, will be adjudged with us a valid and binding stipulation.

In the two cases before this court where the question has been raised (*Bray v. Virginia F. & M. Ins. Co.*, 139 N. C. 390, 51 S. E. 922, and *Parker v. Continental Ins. Co.*, 143 N. C. 339, 55 S. E. 717), and in which recovery by the plaintiff was sustained, the fire occurred within thirty days from the date of the policy, and by the express terms of the contract, the provision known as the iron-safe clause, while incorporated in the policy, had not become effective.

In construing this clause, the better considered authorities seem to be to the effect that it should receive a reasonable interpretation, and that only a substantial compliance should be required: *Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S. W. 1060; *Western Assur. Ins. Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661; *Western Assur. Ins. Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619; *Liverpool etc. Ins. Co. v. Kearney*, 94 Fed. 314, 36 C. C. A. 265, 180 U. S. 132, 21 Sup. Ct. Rep. 326, 45 L. ed. 460. There are decisions, however, which hold that a literal compliance should be exacted. But whatever may be the correct rule, there has been no compliance in the present case.

The plaintiff, giving evidence in his own behalf (and his was the only oral testimony produced at the trial), testified as follows: "The defendant's agent asked me in regard to an inventory, and I said to him I did not have an inventory: that I only took an assay of the goods about once a year. He then asked me if I had any inventory of my stock here at home, and I told him no": Record, p. 17. And again, on pages 21 and 22, plaintiff testified further as follows: "Yes. I had another store. The two stores were two miles—maybe a little further—apart. I have been running the other store¹¹ about six or seven years. The first stock in the new store was made partly out of the old store; the goods were in

boxes and were just carried to the other store. I had moved these goods there in May, 1904. They had been in my other store and had not been there but just a little bit. They consisted of drygoods, clothing, hardware, tin hardware, groceries and shoes. I never separated those bills. There were also some drugs—just a general line. No, I never kept any books of the Erastus store. Just a memorandum. I have the sale-books. I have the memorandum of the books kept. I just tore the leaves out of the book and have them here in my vest pocket. Here are the credit accounts.”

Plaintiff’s counsel endeavored to supply the data which would furnish an approximate estimate of the amount of goods by offering as exhibits certain invoices of goods which plaintiff had sent from the principal store to the store at Erastus, and of some which he had purchased for the latter store after the enterprise was under way. A part of these invoices were burned in the store, but other and much the greater part had, it seems, been copied onto two or three leaves of the ledger of the home store. But these invoices and the entries made from them do not all amount to an inventory of the goods. They are simply a general statement of the aggregate value of goods sent by plaintiff from one store to the other, and frequently the kind of goods is altogether omitted. Thus, the amount of bills of goods taken from Fernhurst store to Erastus store:

“No. 1. Shoes	\$377.45
No. 2. Drygoods.....	259.86
No. 3. Mixed bills	83.29
No. 4. Mixed bills	68.89”

—etc., showing five others, termed mixed bills. Then three “bills for suits”; then bill for shoes, aggregating \$1,342.34.

¹² In *Roberts v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559, an inventory is defined to be “A detailed and itemized enumeration of the articles composing the stock with the value of each.” And other decisions and law books generally give substantially a similar definition: *Southern Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821, 52 L. R. A. 70; *Fire Assn. of Philadelphia v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153; *Western Assur Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661; *Black’s Law Dictionary*, 643.

In *Kemendo’s* case (97 Tex. 367, 60 S. W. 661), Brown, J., delivering the opinion, stated the object and purpose of in-

ventory as follows: "The object of having an inventory made was not to ascertain the gross value of the property insured, but to ascertain the different articles that went to make up the stock in order that the insurance company might test the correctness of the claim in two respects: (1) whether the articles of which the stock was composed all belonged to the class of goods covered by the policies; (2) whether the valuations attached to the different items, and which went to make up the total sum expressed, was reasonable." Speaking further on this subject—and the comment is appropriate to the facts before us—the judge said: "If the assured had furnished everything from which the information contracted for could be with reasonable certainty ascertained, then the question of substantial compliance would be before the court; but where there is no compliance whatever, there can be no question of substantial compliance." And so it is here.

There has never been any inventory taken of the goods comprising the stock of this Erastus store, the one covered by the policy. There is not now, and has never been, any data from which such an inventory could be reasonably approximated.

The plaintiff himself, testifying to this question, very correctly and properly said: "No, I do not know how much hardware, groceries and shoes I had. I never separated these bills. There was also some drugs—just a general line." The ¹³ court was right, therefore, in holding that on the evidence of plaintiff, there had been a breach of the first stipulation in the iron-safe clause.

Plaintiff then takes the position that while this ruling would prevent a recovery for the loss of the goods, he should still be allowed to recover for the loss of the storehouse, inasmuch as the policy placed a definite and distinct portion of the insurance on the building. But we cannot so interpret the contract. True, the amount of the insurance is apportioned, a definite sum being specified for the building and another for the goods. It is also true that the stipulations of the iron-safe clause are more especially addressed to the insurance of the goods; but the premium on the policy is entire; the concluding stipulation is to the effect that if the insured fails to produce the set of books and inventories as required by the contract, the policy shall become null and void and the "failure shall constitute a perpetual bar to any

recovery thereon." And furthermore, the goods are insured "while they are contained in the storehouse, and not elsewhere"; thus making the risk on the goods and on the building substantially identical.

According to the evidence the goods were placed in a small frame structure twenty-five by twenty-five feet, not worth over three hundred dollars, where the destruction of the one would almost of a certainty involve the destruction of the other; and the physical hazard of the risk and the moral hazard, as affected by these stipulations in question, were one and the same. In such case, we are clearly of the opinion that the contract is not divisible, and that a breach of the stipulation will go to the entire measure of the obligation.

We are aware that there is much conflict among the decisions on policies of this character, where separate amounts are named on different items or kinds of property, and the premium is one and entire. Many of the decisions are to the ¹⁴ effect that whenever the premium is entire and undivided, the obligation is likewise indivisible, and that a breach of a stipulation when it so provides will bar any and all recovery in case of loss.

This was so held in the well-considered case of *Southern Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821, 52 L. R. A. 70, and in which many authorities are cited. There are cases to the contrary, as in *Miller v. Delaware Ins. Co.*, 14 Okla. 81, 75 Pac. 1121, 65 L. R. A. 173, cited by plaintiff's counsel, in which a recovery for the building was sustained, notwithstanding there had been a breach of the iron-safe clause established, the clause being expressed in the exact language of the one contained in this policy; and quite a number of cases are cited as supporting authority.

Without going into any extended review of these different decisions, we are of opinion that the great weight of authority, as well as the better reason, establishes the positions that when, to the fact that the premium is entire, there is added the fact of identity of risk, the obligation is single, and on breach of the stipulation all recovery is barred.

This question of identity of risk being held the determinative factor in policies of this kind, where the amounts are separate and the premiums entire, is very well treated in a note to *Wright v. Fire Ins. Co.*, 19 L. R. A. 211, the case

being taken from 12 Montana, 474, 31 Pac. 87, where a number of decisions on this subject are considered and reviewed.

There are cases in our own court where this identity of risk has been made a controlling feature in the decision: *Cuthbertson v. North Carolina Ins. Co.*, 96 N. C. 480, 2 S. E. 258; *Briggs v. North Carolina Ins. Co.*, 88 N. C. 141. In this last case Ruffin, J., for the court said: "But it is not necessary that we should further advert to them or attempt to reconcile them, for according to no one of them is there a doubt but that in a case like ours, in which the property insured consists of a single storehouse ¹⁵ and the goods kept therein, a breach as to part will work a forfeiture as to the whole. In such case it is impossible to introduce any new element of carelessness by lessening the interest of the owner in one species of the property, so as to increase the risk thereof, without at the same time adding to the hazard of the other. Every risk that can attend the one must attend the other, and consequently the same rule must apply to both."

We hold that on the entire evidence no recovery could be had, and the action was properly dismissed.

Affirmed.

On the Construction of Iron-safe Clauses in insurance policies, see the recent cases of Continental Fire Ins. Co. v. Whitaker, 112 Tenn. 151, 105 Am. St. Rep. 916; Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295; Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 90 Am. St. Rep. 98. As to the divisibility of such clauses, see Mitchell v. Mississippi Home Ins. Co., 72 Miss. 53, 48 Am. St. Rep. 535; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 78 Am. St. Rep. 216. The entirety of insurance contracts generally is discussed in Republic County Mut. Fire Ins. Co. v. Johnson, 69 Kan. 146, 105 Am. St. Rep. 157, and cases cited in the cross-reference note thereto.

CLARK v. PATAPSCO GUANO COMPANY.

[144 N. C. 64, 56 S. E. 858.]

APPEAL AND ERROR—Objection to the Form of Presenting Issues.—The trial court need not submit issues in any particular form. If they are framed so as to present the material matters in dispute and to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of the statute as presenting the issues is fully met. (p. 934.)

APPEAL AND ERROR.—A party is not entitled to have an issue presented to the jury respecting matter not pleaded. (p. 936.)

EVIDENCE, What Sufficient to Show Injury from Maintaining a Dam.—If there is testimony showing that, before the erection of a cross-dam complained of, the waters of a stream were accustomed to pass down a natural depression without injuring the plaintiff's land or his dam, but that after the erection of such cross-dam the plaintiff's dam was broken three times during freshets and had never been broken before, this is sufficient to support a finding that the plaintiff and his land were injured by such cross-dam, and such testimony is therefore competent and relevant. (pp. 937, 938.)

EVIDENCE is Competent, Relevant and Admissible, though it may not be such as of itself to establish a fact, if it is such that the jury may, in connection with it and other facts properly alleged, make a finding respecting some issue material to the cause. (pp. 938, 939.)

WATERS, Right of One Proprietor to Obstruct to the Injury of Another.—A proprietor cannot legally obstruct what is known as the flood channel of a river by erecting a dam across it, and thereby forcing the water back upon the dam of another riparian proprietor to his injury. (p. 939.)

WATERS, Obstruction of Flood Channel Adjacent to.—Flood channels must be considered as part of a stream, and no obstructions or structures of any kind can be placed in their beds which will have a tendency to dam the waters back upon another riparian proprietor. (p. 939.)

WATERS.—Generally, water which in times of freshets overflows the bank of a stream and is accustomed to flow over adjacent low land in a defined stream is to be treated as a watercourse rather than as surface water, and a riparian owner is not allowed to stop the flow by erecting barriers to the injury of another. (p. 940.)

WATERS, Joinder of Causes in Producing Injurious Result.—The fact that other causes may have concurred with the defendant's wrong in producing an injury by throwing water upon plaintiff's land does not relieve the defendant from liability. (p. 942.)

Daniel, Travis & Kitchen, for the plaintiff.

Day, Bell & Dunn, Aycock & Daniels and Murray Allen, for the defendant.

WALKER, J. The plaintiff alleges that he owns and cultivates a tract of land in Halifax county, containing about fourteen hundred acres, and lying on the south side of the

Roanoke river, and the defendant owns and cultivates a large tract of land which lies above the plaintiff's and between it and the said river. The plaintiff and those under whom he claims have for many years maintained, on what is now his farm, a dam or embankment, which is parallel with the said river and about one-half mile therefrom, for the purpose of preventing the flooding of the plaintiff's cultivated lands by the waters of the river which overflow its banks in times of high freshets. There is a large bend in said river just opposite the farms of the plaintiff and defendant, the same beginning on defendant's farm, extending out in a north or northeast direction, and ending just below plaintiff's farm. Extending across said bend, from about where it begins on defendant's farm to where it ends below plaintiff's farm, is a wide natural depression, or drain, ranging in width from about three ^{or} hundred yards to a mile, which is the natural course, or drain, for a large portion of the waters of said river in times of freshets and floods. Said drain runs about parallel to plaintiff's dam, between it and the river, and not only affords room for the spread of the waters of the river, but takes the overflow waters, or the greater part thereof, across said bend and past plaintiff's farm, very much more rapidly and quickly than the same could be taken by the course of the river. In the year 1897 the defendant wrongfully and unlawfully erected a cross-dam from a point on Roanoke river about opposite the lower part of plaintiff's dam, across said depression or drain, to the plaintiff's dam near its lower end, extending the same over the lands of one W. H. Josey, and for a short distance over the plaintiff's land, and joining it to the plaintiff's dam without plaintiff's consent. Said cross-dam runs at about a right angle to plaintiff's dam, and was made higher and much stronger than his dam. The defendant has ever since wrongfully and unlawfully maintained said cross-dam.

That the defendant wrongfully and unlawfully erected a dam or embankment, from the end of said cross-dam next to the river up and along said river to a point some distance above plaintiff's farm, and thence across to the high land of the defendant's farm, the latter part of said dam being called the "upper dam." The defendant wrongfully and unlawfully maintained said dams until May 25, 1901.

It is further alleged that the defendant unlawfully and wrongfully obstructed the natural flow of the water in the

river, and caused the same to pond and collect in larger quantity than it otherwise would have done. It is then alleged that in May, 1901, there was a large freshet in the river, and the defendant's upper dam, by reason of its negligent and faulty construction, gave way, and the waters of the river ⁶⁸ were thrown upon the plaintiff's land in much greater volume and with much greater force than would have been the case if the said dam had not been there. and that the lower or cross-dam stopped the flow of the water as it rushed down the said natural drain or depression and caused it to be ponded back on the plaintiff's land and against his dam, so that it broke and the water escaped through the breach thus made and flooded the plaintiff's lands, to his great damage. The plaintiff also alleges separately that the said wrongful acts of the defendant were negligently done, in respect not only to the manner of constructing the dams, but to the obstruction of the natural flow of the water.

The material allegations of the complaint were denied by the defendant, which pleaded specially that it had acquired an easement, by twenty years' adverse user, to maintain the lower or cross-dam as well as the other dams described in the complaint, and that it owed no duty to the plaintiff concerning the same and had committed no wrong to him by reason of the alleged acts of which he complains.

In order to show that the plaintiff's dam was broken by the ponding of water back upon it, and that this was caused by the cross-dam of the defendant obstructing the natural flow of the water from the river down the natural depression or channel and through the defendant's land, the plaintiff proposed to show by his own testimony that since the cross-dam was erected his dam had been broken several times at the same place. The defendant restored it each time it broke, and the plaintiff testified that when restored it was not as good a dam as it was before the first break. It was about the same height, though not as thick. This evidence was admitted over the defendant's objection. The plaintiff had previously testified that the break in his dam was about ten feet from the defendant's cross-dam—right at the junction ⁶⁹ of the two dams. The witness also testified that if the upper dam and the cross-dam were not there, the natural course of the overflow water during freshets would be down the deep depression on the defendant's land, and that his

dam had not broken until the cross-dam was built, the latter being higher and thicker than his dam. There was evidence tending to show that the deep depression on the defendant's land served as a natural drain or flood-channel for the waters of the river in times of freshets. The defendant's proof tended to show that the plaintiff's dam was stronger and better when it was restored than it had been before. The parties introduced testimony which tended to sustain their respective contentions.

The defendant in apt time requested the court to submit the following issues to the jury: "1. Did the defendant by its maintenance of its river dam wrongfully cause any injury to the plaintiff? 2. Did the defendant have an easement to maintain said dam? 3. Did the plaintiff enter into an agreement with the defendant to forego any right to recover damages if the defendant would restore plaintiff's dam to the condition in which it was before the injury? 4. Did the defendant comply with said agreement? 5. What damage, if any, has plaintiff sustained?" The court refused to submit the issues, and defendant excepted. The court then submitted three issues, which, with the answers thereto, were as follows: "1. Did the defendant negligently obstruct the natural flow of the flood waters of Roanoke river by its dams, and cause the same to collect and be thrown against plaintiff's dam in greater volume and force than they naturally would have been, and thereby break plaintiff's dam and flood and injure his farm, as alleged? A. No. 2. Did defendant by its dam wrongfully and unlawfully obstruct the natural flow of the flood waters of Roanoke river ⁷⁰ and cause the same to collect and be thrown upon plaintiff's dam in greater violence and force than they otherwise would have been, and thereby break the same and flood and injure plaintiff's farm, as alleged? A. Yes. 3. What damage, if any, is plaintiff entitled to recover? A. \$1,000."

The court charged the jury in part as follows: "The plaintiff contends that outside of said dam and between it and the main channel of the river there is a natural depression or drain three hundred or more yards wide, which is a natural flood channel of Roanoke river—that is, a channel through which the overflow waters of the river naturally flow whenever the waters rise sufficiently high to overflow the banks of the main channel of said river—and the court charges you, if you find this to be true, that there was such

a flood channel between the plaintiff's dam and the river, that the defendant had no right to obstruct said channel with his dam or dams, unless the defendant has shown by a preponderance of evidence that it had an easement or prescriptive right to do so." "That water resulting from an overflow in districts where flood waters cover great tracts of land may be treated as surface water, and the land owner incurs no liability where in protecting his land from such overflow he throws the water upon an adjoining proprietor, except when he diverts or obstructs water from the flood channel of such stream, for the flood channel of a stream is as much a natural part of it as is the ordinary channel." The defendant excepted to each of these instructions.

The other facts pertinent to the exceptions relied on in this court are stated in the opinion. There was a judgment upon the verdict for the plaintiff, and the defendant appealed.

⁷¹ There are only two exceptions discussed in the appellant's brief, and those not mentioned are to be taken as having been abandoned under rule 40 of this court: 140 N. C. 666. While we are not required to consider them, they have been examined and found to be without merit.

The court below need not submit issues in any particular form. If they are framed in such a way as to present the material matters in dispute, and so as to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and, if when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of the statute is fully met: *Hatcher v. Dabbs*, 133 N. C. 239, 45 S. E. 562; *Falkner v. Pilcher*, 137 N. C. 449, 49 S. E. 945; *Jackson v. American Telephone & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738. This case is much like the one last cited in principle. Here, as in that case, the defendant, by proper requests for instructions, could have had the benefit of all the defenses which are covered by the issues it tendered, and indeed the charge of the court presented the case to the jury, under the issues submitted, in every possible aspect, except as to the settlement with the plaintiff, and this was not pleaded. That matter was, therefore, not properly before the court, as it was not made an issuable fact by the pleadings. The ques-

tion of easement was submitted to the jury under the second issue with full and correct instructions as to what would constitute an easement and with proper reference to the evidence relating thereto. The jury were directed to answer the second issue "No" if they found that no easement to maintain the dam existed. They answered the issue "Yes," thereby finding that there was no easement. We do not think the defendant was in any sense prejudiced by this action of the court: *Cowles v. Lovin*, 135 N. C. 488, 47 S. E. 610; *Deaver v. Deaver*, 137 N. C. 240, 49 S. E. 113. If ⁷² the defendant succeeded in showing that the easement existed at any time, there was evidence of nonuser for as much as twenty years (*Crump v. Mims*, 64 N. C. 767), and whether there had in fact been such disuse was a question for the jury. They gave their verdict on this point against the defendant. This disposes of the questions of easement and settlement. The question raised by the defendant's first issue was certainly embraced by the second issue submitted by the court. Indeed, the latter more clearly and definitely presented the precise matter in controversy, and was therefore the more preferable of the two, as will hereafter appear.

The two questions reserved, under the rule, in the defendant's brief, and to which the argument before us was mainly addressed, relate, first, to the competency of the plaintiff's testimony as to the several breaks in his dam after the defendant's cross-dam was constructed, and, second, to the liability of the defendant for having obstructed the flood channel of the river on his own land by his cross-dam and thereby diverting the water to the plaintiff's dam and causing the same to break and his lands to be flooded.

As to the relevancy of the evidence admitted by the court, the ruling, we think, was free from error. The plaintiff testified that before the cross-dam was erected the overflow or flood water of the river was accustomed to pass down the depression at the foot of his dam without doing any injury thereto, and that his dam was broken by the ponding of the water back against it, which was caused by the obstruction of the defendant's cross-dam to its natural flow. He further stated that his dam had never been broken by the water before the erection of the cross-dam, but that after its erection, it had broken three times during freshets, on account of the ponding of the water. There was no objection when

⁷³ he testified to the first break in his dam in May, 1901. We do not see why the evidence as to all the breaks was not relevant to the issue. If the dam had not been injured before the cross-dam was erected and the water was ponded back, and the plaintiff's dam was broken several times after it was erected, this would seem to indicate a causal connection between the erection of the dam and the injury which followed. There was the positive evidence of the plaintiff as to the cause of the first break in the dam, namely, the freshet and the cross-dam; and, if necessary, this should be considered in passing upon the testimony to which objection was taken. If by relevancy is meant the logical relation between the proposed evidence and the fact to be established, the testimony was admissible when tested by this definition. It is not a case where conditions are required to be the same, or at least similar, as where a comparison between two things is made to ascertain if they have the capacity to produce the same effect, as in *Rice v. Railroad Co.*, 130 N. C. 375, and *Bullock v. Lake Drummond Canal & W. Co.*, 132 N. C. 179, 43 S. E. 593; nor is the question like that raised in *Warren v. Makley*, 85 N. C. 12, and *Bruner v. Threadgill*, 88 N. C. 361, where it was attempted to show the value of one tract of land by comparing it with that of an adjoining tract. Our case is more like that of *Johnson v. Atlantic C. L. R. R. Co.*, 140 N. C. 581, 53 S. E. 362, and the class of cases to which it belongs, in each of which the plaintiff, in order to show that sparks from a certain engine had set his property afire, was permitted to show that the engine had emitted sparks shortly before or after the fire: *Knott v. Cape Fear etc. R. R. Co.*, 142 N. C. 238, 55 S. E. 150. In *Aycock v. Raleigh etc. R. R. Co.*, 89 N. C. 321, the fact that a train had just passed was held to be presumptive evidence that it had caused the fire, which was discovered near its track. Under the circumstances of this case there was an open and visible connection between ⁷⁴ the obstruction of the water by the cross-dam and the subsequent breaking of the plaintiff's dam. The law does not require a necessary connection, which would practically exclude all presumptive evidence, but such as is reasonable, and not latent and conjectural: *Bottoms v. Kent*, 48 N. C. 154; *Johnson v. Atlantic C. L. R. R. Co.*, 140 N. C. 581, 53 S. E. 362. The evidence which was admitted fulfills that requirement. We do not

hold that this evidence is sufficient of itself to establish the fact of injury to the plaintiff's dam, but that the breaking of his dam three times, under all the circumstances to which he testifies, is fit to be considered by the jury, in connection with the other facts, upon the question as to whether defendant's dam caused the alleged injury. It is more than conjectural evidence.

This brings us to the consideration of the principal question in the case: Could the defendant legally obstruct what is known as the flood channel of the river by erecting a dam across it and thereby force the water back upon the plaintiff's dam to his injury, as already described? We think it is thoroughly well settled that it cannot, but is liable for the damages which resulted proximately from its wrongful act. "Every stream flowing through a country subject to a changeable climate must have periods of high and low water. And it must have not only its ordinary channel, which carries the water at ordinary times, but it must have, also, its flood channel, to accommodate the water when additional quantities find their way into the stream. The flood channel of the stream is as much a natural part of it as the ordinary channel. It is provided by nature and it is necessary to the safe discharge of the (increased) volume of water. With this flood channel no one is permitted to interfere to the injury of other riparian owners": 3 Farnham on Waters, secs. 879, 880. It is further said by the same author that ⁷⁵ the courts are very nearly agreed that the flood channel must be considered as a part of the stream, and no structures or obstruction of any kind can be placed in its bed which will have a tendency to dam the waters back upon the property of another riparian proprietor. The depression or drain which is mentioned in the evidence is a high-water channel of the kind described. It is auxiliary to the main channel, relieving it when the water is high and the swollen stream overflows its banks, the low places on the river acting as natural safety valves in times of freshets. These depressions or channels being provided by nature for the safe discharge of the large volume of water when the bed of the stream becomes incapable of retaining it, the course which the flood water is in the habit of taking through them cannot be changed or obstructed to the injury of adjoining private land owners: Farnham on Waters, sec. 880. The wrong committed in blocking such a channel is of the same charac-

ter as that of one who closes a natural drainway on his own land, and thereby causes the land of an upper proprietor to be flooded by the backwater.

The principle governing this case has frequently been recognized and applied by this court. In *Overton v. Sawyer*, 46 N. C. 308, 62 Am. Dec. 170, it was held that without reference to the plaintiff's acquisition of an easement by presumption, the defendant had a right to have the water allowed to pass off his land through a natural drain, and when the plaintiff, by means of an embankment across the drain, obstructed the flow of the water and thus interfered with the rights of the defendant, the latter had a cause of action against him for the resulting injury to his property. So in *Pugh v. Wheeler*, 19 N. C. 50, the court decided that ponding water back upon another's land by any act which impedes its natural flow is a clear and direct invasion of the proprietary interest ⁷⁶ in the land itself and is an actionable wrong, unless protected by a grant of the right so to do or by an easement in some other way acquired. It was asserted in *Porter v. Durham*, 74 N. C. 767, as being an elementary principle, which is founded on reason and equity, and common both to the civil and common law, that the owner of land cannot raise any barrier or dike, even for the better enjoyment of his own property, so as to obstruct the natural drainage of another's land and thus intercept and throw back the water upon it. "An owner may not use his property absolutely as he pleases. His dominion is limited by the maxim, 'Sic utere tuo ut alienum non laedas.' " Numerous cases to the same effect may be cited: *Shaw v. Etheridge*, 48 N. C. 300; *Hair v. Downing*, 96 N. C. 172, 2 S. E. 520; *Wilhelm v. Burleyson*, 106 N. C. 381, 11 S. E. 590; *Staton v. Norfolk R. R. Co.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838; *Rice v. Norfolk & C. R. R. Co.*, 130 N. C. 375, 41 S. E. 1031; *Mizell v. McGowan*, 125 N. C. 439, 34 S. E. 538.

The principle, in its application to flood waters, is clearly stated in *Jones on Easements*, section 729, where it is said generally that water, which in times of freshet overflows the bank of a stream and is accustomed to flow over adjacent lowlands in a defined stream, is to be treated as a water-course, rather than as surface water, and a riparian owner is not allowed to stop the flow by erecting barriers to the injury of another: See, also, 13 Am. & Eng. Ency. of Law,

2d ed., 687; Jones v. Seaboard Air Line R. R. Co., 67 S. C. 181, 45 S. E. 188. In discussing a somewhat similar question in Staton v. Norfolk & C. R. R. Co., 109 N. C. 337, 13 S. E. 933, the court, by Merrimon, C. J., said: "A party must submit to the natural disadvantages and inconveniences incident to his land, unless he can in some lawful way avoid and rid himself of them. But he has no right, as a general rule, to rid himself of them by shifting them by artificial means to the land of another, when naturally and in the order of things they would not go upon such land or affect it adversely." To the same purport is the language of the court in Mizell v. McGowan, 120 N. C. 134, 26 S. E. 783: "The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions and the privilege or easement of the upper tenant to carry off the surface water in its natural course under reasonable limitations, and the subserviency of the lower tenant to this easement, are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear the servitude to the superior, and must receive the water that falls from the latter. The servient tenant cannot complain of this, because *aqua currit et debet currere ut solebat*." If a riparian owner can raise the banks of a stream so as to confine the flood water and prevent its overflowing his land, without occasioning any injury to the property of others, he may do so, but he must suffer the consequences of any failure in the attempt: Jones on Easements, sec. 729. He cannot set up a barrier to the flow of the water in its natural or accustomed channel if it will result in injury to his neighbors. This court has said in Staton v. Norfolk & C. R. R. Co., 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838, that, in adapting his property to any use, the land owner is subject to the law of adjoining proprietors and to the maxim, "*Sic utere tuo ut alienum non laedas*." If in such adaptation the adjacent owner's rights of property are violated, he is entitled to compensation, not so much on the ground of a want of skill or diligence in constructing the work of improvement, as for the reason that by injuring his neighbor's land he has to that extent invaded his right of property. It is the wrong done, and not the manner of doing it, that primarily determines the liability. Applying these principles to the facts of this case, we find that the

court fully and correctly instructed the jury as to the liability of the defendant for obstructing ⁷⁸ the flood channel of the river and ponding the water back upon the plaintiff's lands, leaving it to them to find the facts upon which such liability depended. He also charged the jury upon the question of surface water as favorably to the defendant as the law permitted. The jury found that there was a flood channel which had been wrongfully obstructed to the plaintiff's damage, and this finding was made under instructions of the court based upon evidence and free from any error we have been able to discover.

The fact that other causes may have concurred with the defendant's wrong in producing the injury does not relieve it of liability; for tort-feasors contributing to the same injury are jointly and severally liable: *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548. "When the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. This is one form of a universal principle in the law, that he who contributes to a wrong, either civil or criminal, is answerable as doer. And it is immaterial to this proposition whether that to which he contributes is the violation of a responsible person, or of an irresponsible one, or whether it is a mere inanimate force, or a force in nature, or a disease": *Bishop on Noncontract Law*, 1889, sec. 39; *Barrow on Negligence*, 25; *Cooley on Torts*, 3d ed., p. 1471; *Slater v. Mersereau*, 64 N. Y. 138.

The other exceptions, which are not mentioned in the brief of the defendant's counsel, disclose no reversible error, as we have stated, and require no special comment.

No error.

Clark, C. J., did not sit on the hearing of this case.

The Right of One Land Owner to Accelerate or Diminish the Flow of Water to or from the lands of another is the subject of a note to *Mizell v. McGowan*, 85 Am. St. Rep. 707. A lower riparian owner has no right to maintain a dam which will back water upon an upper riparian proprietor's land in time of freshets or prevent its flowing therefrom to his injury, though at ordinary stages of water the dam occasions no injury: *Allen v. Thornapple Elec. Co.*, 144 Mich. 370, 115 Am. St. Rep. 453. But it has been affirmed that a riparian owner who constructs a dam so as to hold water coming down in usual and customary freshets is not liable to a lower proprietor for injury resulting from the failure of the dam to hold the water in time of extraordinary flood: *Alabama etc. Coal Co. v. Turner*, 145 Ala. 639, 117 Am. St. Rep. 61.

DEAL v. SEXTON.

[144 N. C. 157, 56 S. E. 691.]

CHILD EN VENTRE SA MERE, Inheritance of.—Upon the death of a father, the inheritance vests immediately in his child en ventre sa mere as well as in his children already born. (p. 943.)

A CHILD EN VENTRE SA MERE, for all the Beneficial Purposes of Heirship, is considered as absolutely born. (p. 944.)

PARTITION—Judgment, Effect of as Against Child En Ventre Sa Mere.—An unborn child not having been made a party, his rights are not cut off by a decree in partition to which his mother and sisters are the only parties and a sale thereunder, even in favor of an innocent purchaser. (p. 946.)

Action to recover an interest in real property. Judgment for the plaintiff, and the defendant appealed.

Ward & Grimes, for the plaintiff.

H. W. Stubbs, for the defendant.

¹⁵⁷ BROWN, J. It appears from the case agreed that F. B. Wilson died intestate in 1881, seised in fee of the land in controversy. At the time of his death his wife was enceinte, and within four months thereafter, on December 22, 1881, the plaintiff, Frances, was born. On October 22, 1881, two months before plaintiff was born, the widow, Deborah, and two daughters, Carrie L. and Maude L. Wilson (the only children then born), filed petition for partition and procured the lands of the intestate to be sold and the proceeds divided between them. W. E. Sexton became the purchaser, ¹⁵⁸ who conveyed to defendant for full value. The plaintiff was not made party to the proceedings by appointment of a guardian ad litem or otherwise, either before or after her birth, and has received no part of the proceeds of sale. She now seeks to recover her portion of the inheritance.

The question presented upon this appeal is important and perplexing because of the fact that the defendant is a purchaser for value, and because of the great difficulty in purchasers at such judicial sales protecting themselves, having no knowledge of the existence of an unborn child in its mother's womb. If we hold, as we must, that the inheritance vested immediately in the plaintiff while en ventre sa mere, upon the death of the father, the conclusion must fol-

low that such inheritance ought not to be divested and the child's estate destroyed by judicial proceedings to which it was in no form or manner a party, and for which not even a guardian ad litem was appointed. It may be that our civil procedure is defective in not providing for such contingencies, but that is no reason why the vested estate of the unborn child in esse should be taken from it. The general rule in this country and the acknowledged rule of the English law is that posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him, and for all the beneficial purposes of heirship a child en ventre sa mere is considered absolutely born. This has been the recognized law of this state since *Hill v. Moore*, 5 N. C. 233, decided in 1809, down to *Campbell v. Everhard*, 139 N. C. 503, 52 S. E. 201, decided in 1905. It is also recognized generally by the text-writers and judicial decisions in other states. 4 Kent's Commentaries, 13th ed., p. 413; 3 Washburn on Real Property, 5th ed., p. 16; Tiedeman on Real Property, sec. 673; 14 Cyc. 39, where the decisions are collected.

¹⁵⁰ The statute law of this state treats the unborn child in its mother's womb with the same consideration as if born. By the 7th Canon of Descent, Revisal, page 1556, a child born within ten lunar months after the death of the ancestor inherits equally with the other children. By section 1582, an infant unborn, but in esse, is rendered capable of taking, by deed or other writing, any estate whatever in the same manner as if he were born: *Campbell v. Everhard*, 139 N. C. 503, 52 S. E. 201. From most remote times the common law of England regarded such child as capable of inheriting direct from the ancestor as much so as if born: *Doe v. Lancashire*, 5 Term Rep. 49; *Thelluson v. Woodford*, 4 Ves. Jr. 227; *Harper v. Marshal*, 43 Am. Dec. 474, where all the cases are collected.

The old writ of de ventre inspiciendo was devised by the courts for the purpose of examining the widow, and was granted in a case where a widow, whose husband had lands in fee, marries again soon after his death and declares herself pregnant by her first husband, and under that pretext withholds the land from the next heir. Such writ commanded the sheriff or sergeant to summon a jury of twelve men and as many women, by whom the female is to be examined "tractari per ubera et ventrem": 1 Blackstone's Com-

mentaries, 456; 21 Vin. Abr., p. 548. Of course, no such unseemly proceeding would be tolerated in this age; but the General Assembly could easily protect the unborn child as well as the innocent purchaser by prohibiting the sale of land for partition until twelve months after the intestate's death.

The question as to the status of the purchaser was considered by the supreme court of Kentucky in the case of *Massie v. Hiatt's Admr.*, 82 Ky. 314, in which it is held: 1. A child born within ten months of the death of the intestate is entitled to a share in his estate, as if born and in being at the time of intestate's death. 2. The court had ¹⁶⁰ jurisdiction to sell the land on the petition of the guardian of the two other children; but the sale affected only their rights. The right of the unborn child could not in anywise be affected. 3. Having an interest in the land, she could not be deprived of it by any proceeding to which she was not a party, and may recover such interest from a remote vendee of the purchaser at the judicial sale.

The supreme court of Illinois reaches the same conclusion, and says that a person must have an opportunity of being heard before a court can deprive him of his rights, and that an unborn child, not having been made a party, can recover from those claiming his title, as his rights are not cut off by the decree: *Botsford v. O'Connor*, 57 Ill. 72.

The case of *Giles v. Solomon*, in New York, 10 Abb. Pr. N. S., 97, note, is very much in point. In that case a bill to foreclose a mortgage executed by the deceased father was filed in January 1841. A daughter was born to his widow in April, 1841, two days after foreclosure decree was entered. The daughter, not being a party to the foreclosure proceedings, brought her action in 1866 to redeem. The court held she was not barred by the decree of 1841, and permitted her to redeem her one-seventh by paying one-seventh of the mortgage and interest, and charged the purchaser with back rents.

In South Carolina at one time the courts declined to proceed with a suit to partition the property of the ancestor until twelve months after his death, so as to avoid the possibility of entering judgment which might conflict with the rights of an unborn child. As there was no statute on the subject, the courts of South Carolina discontinued this practice for some reason, and then held that a child en ventre

sa mere must be regarded as a person in being who could not be bound ¹⁶¹ by a judgment in partition to which he was not a party: *Pearson v. Carlton*, 18 S. C. 47.

It is true that Judge Freeman, in his elaborate note to *Carter v. White*, 101 Am. St. Rep. 869, 870, repudiates this doctrine and says: "It is believed, however, that the rule cannot prevail, and that such a child must be regarded as not in being for the purpose of the suit and as being represented by the parties before the court," etc. The authority cited by the learned annotator is the opinion of the supreme court of the United States in *Knotts v. Stearns*, 91 U. S. 638, 23 L. ed. 252, which seems to sustain him. The fallacy in the position seems to us to be in supposing that the living children can represent the unborn child. It is not a case of class representation. The interests are conflicting and not mutual. It is to the interest of the living heirs to make the division as short as possible, and therefore to keep out the heir who has not yet made his appearance. The cases of *Ex parte Dodd*, 62 N. C. 97, and many similar cases to *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116, have no application here, as the object of a partition proceeding is to dissever the interests of the parties, and there is no class representation about it. The tenant in common who is not made a party personally or by guardian ad litem, or in some legal way, is not bound by it.

In the forcible language of counsel for plaintiff in their brief: "If the court could take what the law said was hers and sell and convey to another without her even having knowledge of it, or representation, our boasted 'process of law' doctrine is iridescent—a constitutional hallucination."

Affirmed.

CHILD EN VENTRE SA MERE.

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I. Restricted Use of the Terms in This Note.

A child *en ventre sa mere* is, of course, one in its mother's womb; one which, having been conceived, is not yet born. For the purposes of this note, however, the expression will be employed in a more restricted sense, and applied only to such children as are finally born alive and after such period of foetal existence that they might reasonably be expected to live. Whatever general declarations may be found in the decisions or text-books to the effect that a child *en ventre sa mere* must, for all purposes beneficial to it, be considered as if born, must be accepted with the qualification that it shall subsequently be born. For the purposes of civil proceedings and civil rights a child must, after it is born, be regarded as living from the date of its conception: *Hall v. Hancock*, 15 Pick. 255. 26 Am. Dec. 598; *Harper v. Archer*, 4 Smedes & M. 99, 43 Am. Dec. 472; *Marsellis v. Thalhimer*, 2 Paige Ch. 35, 21 Am. Dec. 66; though neither the law nor science has any absolute test to determine when that date is. By the civil law it is clear that children born dead or in such an early stage of pregnancy as to be incapable of living, although not actually dead at the time of birth, were considered as never born or conceived, and children born within the first six months after conception were deemed incapable of living, and therefore, though born alive, were not treated as having lived unless they survived so long as to rebut the presumption of law upon the subject: *Marsellis v. Thalhimer*, 2 Paige Ch. 35, 21 Am. Dec. 66. We have been unable to discover any English or American decision necessarily considering the common law upon this subject. There is no doubt, however, that the mere conception of a child does not give it capacity to acquire property, unless, continuing in life, it is further actually born. The duration of life *en ventre sa mere* is, therefore, a question which neither law nor science has definitely settled. Medical authorities have reached the conclusion that a child has been born alive and actually lived several years, though its birth took place within one hundred and twenty-six days after its conception, and, on the other hand, that a child has been born three hundred and thirty-four days after its conception: 3 Wharton & Stille's Medical Jurisprudence, sec. 66. It is probable that the average period of gestation is between two hundred and sixty-nine and two hundred and seventy days; 3 Wharton & Stille's Medical Jurisprudence, sec. 52. In all of the states a child born within nine months after the death of the husband of the mother would doubtless be deemed legitimate, and this presumption is in a few of the states extended

to ten months: *Massie v. Hyatt's Admr.*, 82 Ky. 314. In hereafter speaking of a child *en ventre sa mere*, we must be understood as referring to one which at the date of some determining or material event had been conceived and was subsequently born alive, so that rights could be claimed in its behalf or in the behalf of some person claiming to have succeeded to such right.

II. The General Rule.

A child *en ventre sa mere*, as a general rule, is after its conception, for all purposes beneficial to it, deemed a person in being, and as such, dependent upon its subsequent birth alive, property and rights of action may vest in it and suits and other legal proceedings may be brought in its behalf: *Hall v. Hancock*, 15 Pick. 255, 26 Am. Dec. 598; *Harper v. Archer*, 4 Smedes & M. 99, 43 Am. Dec. 472; *Marsellis v. Thalhimer*, 2 Paige Ch. 355, 21 Am. Dec. 66; *Jenkins v. Freyer*, 4 Paige, 47; *Hone v. Van Schaick*, 3 Barb. Ch. 488; *Petway v. Powell*, 22 N. C. 308; *Wallis v. Hodson*, 2 Atk. 117, Barn. 272; *Doe v. Clarke*, 2 H. Black. 399, 3 R. R. 430; *Clarke v. Blake*, 2 Bro. C. C. 320, 2 Ves. 673; *Thelluson v. Woodford*, 4 Ves. 322, 4 R. R. 205, 11 Ves. 112, 1 Bos. & P. (N. R.) 357, 8 R. R. 104; *Anonymous*, 1 Freem. Ch. 293; *Tayler v. Bydall*, 1 Freem. Ch. 243; *Gibson v. Gibson*, 2 Freem. Ch. 223; *Goodfellow v. Goodfellow*, 18 Beav. 356, 2 Week. Rep. 360; *Trower v. Butts*, 1 Sim. & S. 181, 1 L. J. Ch. (O. S.) 115, 24 R. R. 164.

III. Exceptions to the General Rule.

a. **It is not to Operate to the Prejudice of the Child.**—Doubtless, the chief purpose of the rule and the object of the judges who first formulated and applied it was to protect the child as if it were actually born; otherwise no person could intervene for its protection, and possibly measures might be taken for the destruction of its rights. Therefore, such a child will not be considered as in being at a time anterior to its birth if, to do so, will lessen its rights or subject it or its estate to some liability or diminution to which it would not be subject if not regarded as in being prior to its actual birth: *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *McKnight v. Read*, 1 Whart. 213; *Armistead v. Dangerfield*, 3 Munf. 20, 5 Am. Dec. 501.

b. **Third Persons not to be Benefited by.**—The rule, as has already been suggested, is for the benefit of the child, and for the purpose only of enabling it to take, receive, or do something for its benefit which it could take, receive, or do if actually born. Hence, if a bequest or trust is made in favor of the children of the testator's nephews and nieces who shall be born and living at her death, to be divided among them when the youngest child reaches twenty-one years of age, a child *en ventre sa mere* takes the benefit, but

the distribution of the fund is not postponed until it reaches twenty-one years of age: *Blasson v. Blasson*, 2 De Gex, J. & S. 665, 5 N. R. 65, 34 L. J. Ch. 18, 10 Jur., N. S., 1113, 11 L. T. 353, 13 Week. Rep. 113. But the existence of a child *en ventre sa mere* may undoubtedly affect the rights of other persons. Thus, if, by the terms of a will or other writing, a thing shall happen or not happen, or property shall vest or not vest, if a designated person has a son or child, or issue at a designated date or event, then the resulting question is not to be determined by inquiring whether such child or issue was born or living at the happening of the event contemplated, but also whether it was *en ventra sa mere* at that time, provided it was subsequently born alive: *Laird's Appeal*, 85 Pa. 339; *Pearce v. Carington*, L. R. 8 Ch. App. 969, 42 L. J. Ch. 900; *Burrows v. Burrows*, [1895] 2 Ch. 497, 65 L. J. Ch. 52, 13 R. 689, 73 L. T. 148, 43 Week. Rep. 683; *Thelluson v. Woodford*, 4 Ves. 227, 323; *Burdet v. Hopegood*, 1 P. Wms. 486. A husband is not entitled to an estate by the curtesy unless a child is born living during the lifetime of the mother, and if, when she dies, she has a child *en ventre sa mere*, which is afterward delivered by means of the Caesarian operation, it cannot be regarded as existing in her lifetime for the purpose of vesting the curtesy in its father: *Marsellis v. Thalhimer*, 2 Paige Ch. 35, 21 Am. Dec. 66; *Matter of Winne*, 1 Lans. 508, 513.

c. **As to Rents and Profits.**—During the period intervening between the conception and birth of a child, rents and profits may accrue to the estate to which it would become entitled if born alive. The authorities upon the subject are somewhat vague and uncertain in the conclusions to be drawn from them. They seem, however, to indicate that, until the birth of such child, the person who is otherwise the heir or is entitled to such rents and profits may demand and receive them, and that the child when born cannot maintain an action for their recovery: *Richards v. Richards*, Johns. 754, 29 L. J. Ch. 836, 6 Jur., N. S., 1145; *Basset v. Basset*, 3 Atk. 203; *Mowlen, In re*, 43 L. J. Ch. 353, L. R. 18 Eq. 9, 22 Week. Rep. 398; but, on the other hand, if they are not collected before the birth of the child by the persons who might have collected them, their right to enforce such collection terminates: *Goodale v. Gawthrone*, 2 Smale & G. 375, 2 Eq. R. 936, 23 L. J. Ch. 878, 18 Jur. 927, 2 Week. Rep. 680.

IV. Application of the General Rule.

a. **To the Law of Descent and Distribution.**—A child which is born is entitled to take property under the laws of descent in force at the time of the death of a person dying intestate, and a child must be held to be in being and entitled to take such property if then *en ventre sa mere* and subsequently born alive: *Morrow v. Scott*, 7 Ga. 535; *Smith v. McConnell*, 17 Ill. 63, 63 Am. Dec. 340; *Botsford v. O'Conner*, 57 Ill. 72; *Massie v. Hiatt's Admr.*, 82 Ky. 314; *Waterman v. Hawkins*, 63 Me. 156; *Bowen v. Hoxie*, 137 Mass.

527; *Catholic B. A. v. Firnane*, 50 Mich. 82, 14 N. W. 707; *Prentiss v. Prentiss*, 14 Minn. 18; *Harper v. Archer*, 4 Smedes & M. 99, 43 Am. Dec. 472; *Aubuchon v. Bender*, 44 Mo. 560; *Hill v. Moore*, 5 N. C. 233; *Long v. Blackall*, 7 Term Rep. 100, 4 R. R. 73.

b. To Wills.

1. **Legitimates.**—If by a will property is devised or bequeathed to a class of persons, all members of such class, including a child en ventre sa mere, are entitled to participate in such devise or bequest: *Rawlins v. Rawlins*, 2 Cox, 425; *Nurse v. Yerworth*, 3 Swan, 608; *Clarke v. Blake*, 2 Ves. 672; *Mason v. Clarke*, 17 Beav. 126, 22 L. J. Ch. 956, 17 Jur. 479, 1 Week. Rep. 297. This was at any early date denied, and it was held that a bequest to a child of a designated person did not include a child en ventre sa mere: *Pierson v. Garnet*, 2 Bro. C. C. 38; *Pre. Ch.* 201n; *Cooper v. Forbes*, 2 Bro. C. C. 63. There is no doubt that such is not the law, and that a devise or bequest to the testator's children or grandchildren or to the children: *Biggs v. McCarty*, 86 Ind. 352, 44 Am. Rep. 320; *Adams v. Logan*, 6 T. B. Mon. 175; *Jenkins v. Freyer*, 4 Paige, 47; *Picot v. Armistead*, 37 N. C. 226; *Flora v. Wilson*, 35 N. C. 344; *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74; *Randolph v. Randolph*, 40 N. J. Eq. 73; or grandchildren of any other person: *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414; *Smart v. King*, Meigs, 149, 33 Am. Dec. 137—includes in its benefit every child en ventre sa mere which, when subsequently born, falls within the class designated. This is true though the will purports to make a devise or bequest in favor of a person living at the death of the testator or of some other person specified therein: *Hall v. Hancock*, 15 Pick. 255, 26 Am. Dec. 598; *Barker v. Pearce*, 30 Pa. 173, 72 Am. Dec. 691. A child en ventre sa mere may take as a pretermitted heir: *Waterman v. Hawkins*, 63 Me. 156; *Bowen v. Hoxie*, 137 Mass. 527; and, on the other hand, may be excluded from the benefits of the will and from all participation in the testator's estate by language in a will clearly expressing that purpose: *Prentiss v. Prentiss*, 14 Minn. 18; *Starling's Exr. v. Price*, 16 Ohio St. 29; *In re Emery's Estate*, 3 Ch. D. 300.

2. **Illegitimates.**—An illegitimate does not take property by descent unless from its mother, and there can be no doubt that a devise or bequest to the children or grandchildren or issue of any person must be considered as intended for legitimates only, and hence if there is an illegitimate child en ventre sa mere, it will not acquire property by devise or bequest to a child or grandchild: *Methan v. Duke of Devon*, 1 P. Wms. 529; *In re Corless*, 1 Ch. D. 460, 45 L. J. Ch. 118, 33 L. T. 630, 24 Week. Rep. 204. On the other hand, a natural may be object of a testator's bounty as well as a legitimate child, and this rule applies in favor of a child en ventre sa mere: *Earle v. Wilson*, 17 Ves. 528, 11 R. R. 130; *Pratt v. Mathew*, 22 Beav. 328, 4 Week. Rep. 418; *Crook v. Hill*, 3 Ch. D. 773, 46 L. J. Ch. 119,

24 Week. Rep. 876; *Gordon v. Gordon*, 1 Mer. 141, 15 R. R. 88; *Dawson v. Dawson*, 6 Madd. 282. There is some difficulty in maintaining a devise or bequest by a testator in favor of his illegitimate child en ventre sa mere of a designated mother, because it is said that, until born, it cannot have acquired the reputation of being his child, and this rule has been applied in some instances where it manifestly defeated the purposes of the testator, he being at the date of his will and also at the time of his death living with the mother of the child under a marriage which they believed to be valid, but which was in law void: *In re Brown v. Bolton*, 31 Ch. D. 542, 54 L. T. 396, 34 Week. Rep. 325, 50 J. P. 532—C. A., 55 L. J. Ch. 398. Nevertheless, it must be admitted that it is not against public policy for a testator to make a devise or bequest in favor of his illegitimate child en ventre sa mere, and where his will and the surrounding circumstances show clearly that he intended to make a disposition in favor of the illegitimate child or children of a designated woman, her child en ventre sa mere is entitled to the benefit of that disposition if it would have been so entitled had it been born at the testator's death: *Occleston v. Fullalove*, L. R. 9 Ch. 147, 43 L. J. Ch. 297, 29 L. T. 785, 22 Week. Rep. 305.

c. **To Gifts.**—A child en ventre sa mere may acquire the title to property by gift, as where a slave is delivered to a wife then known to be pregnant intended as a gift to her child if it should prove to be a son: *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442.

d. **To Marriage Articles.**—If, by a fair construction of marriage articles, they must be deemed to operate for the benefit of all the children of the marriage, then a child en ventre sa mere is within their protection, as where a grandfather had given a bond for a specified sum to be raised for such child or children of the marriage as should be living at the death of the father or mother. In such case, a child born after the death of the father, if conceived during the marriage, is entitled to share with the rest of the children: *Millar v. Turner*, 1 Ves. Sr. 85.

e. **To Conveyances.**—By the rules of the common law, it was necessary that title by a conveyance should vest at its execution, and therefore that the grantee should then be competent to receive such title. We do not ourselves understand why this rule should be held to render a child en ventre sa mere incapable of acquiring title to real property by conveyance, for the general declaration of the decision is that such child for its own benefit must be considered as in being from the time of its conception and capable of receiving what it could have received had it been born at the date of such conception. We must admit, however, that with respect to conveyances, the weight of authority does not regard a child en ventre sa mere as in existence for the purpose of taking the estate granted, when the right to possession vests upon the grant: *Varner v. Young's Exr.*, 56 Ala. 260; *Dupree v. Dupree*, Busb. Eq. 164,

59 Am. Dec. 590; *Morris v. Candle*, 178 Ill. 9, 69 Am. St. Rep. 282, 52 N. E. 1036, 44 L. R. A. 489. The common-law rules applicable to conveyances have been very generally abrogated or modified in the United States, and we see no reason why a conveyance to the children of A or to A and her children should not vest title in a child of A en ventre sa mere when the conveyance was delivered: *King v. Bea*, 56 Ind. 1; *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155; *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. 333. Even at the common law, such a child might be entitled to participate in the benefits of a conveyance, as where it created a trust to raise a fund for such children of A as should be living at the time of his death. Under this a posthumous child of A must become, on its birth, a sharer in the fund to be thus raised or distributed: *Hale v. Hale*, *Finch's Pre. Ch.* 50.

If the estate was granted to a person in esse, with remainder after his death or some other designated event, in favor of his child or children or of the child or children of some other person, it was probably the rule of the common law that, on the termination of the particular estate, if there were no children then born entitled to the remainder, such estate vested in the person next entitled, and on the subsequent birth of a child, though en ventre sa mere at the determination of the particular estate, the remainder did not vest in it: *Reeve v. Long*, 2 Lev. 408. This rule was abrogated by the statute of 10 and 11 William III, chapter 16. The American courts considering the question have regarded this statute merely as declaratory of the pre-existing law, and hence in this country a child en ventre sa mere at the termination of a particular estate becomes entitled to the remainder as if then actually born, provided it is subsequently born alive: *Aubuchon v. Bender*, 44 Mo. 560; *Stedfast v. Nicoll*, 3 Johns. Cas. 18.

f. **To Rights Created by Statute.**—If a statute creates a cause of action in favor of children for the death of their father through negligence or other tort, there is no doubt that a child en ventre sa mere at such death is entitled to the benefit of the statute. In Texas it has been held that if an action is maintained by a widow of a decedent, she being authorized by the statute to prosecute it, her recovery therein does not preclude a subsequent action and recovery on behalf of her child en ventre sa mere born after the entry of the judgment in question: *Nelson v. Galveston etc. Ry. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. 1021, 11 L. R. A. 391; *Texas etc. Ry. Co. v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 929, 17 S. W. 1041; while in California, though it was not doubted that but for such recovery the action could be sustained for the benefit of such a child, yet it was held that but one action could be sustained under the statute, and hence that the birth of a child after the recovery of a judgment could not, though it was then en ventre sa mere, sustain a subsequent recovery for its benefit: *Daubert v.*

Western Meat Co., 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244. In England, where the proceeding was in admiralty and the attention of the court was called to the fact of the child *en ventre sa mere*, the decree reserved to it leave, if born in due time, to prefer its claim for damages before the register, and subsequently such claim was preferred and allowed: *The George and Rickard*, L. R. 3 Ad. & E. 466, 24 L. T. 717, 20 Week. Rep. 245.

g. To Actions and Suits.—A child cannot, after birth, maintain an action for injuries received by it *en ventre sa mere*, though, after birth, it continues to suffer therefrom, as where a tort is committed upon the mother by way of assault, or she suffers in consequence of negligence and the suffering extends to her offspring. In contemplation of law, the injury is to the mother only, and no action can be maintained except by her or for her death: *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. 638, 48 L. R. A. 225; *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242; *Gorman v. Budlong*, 23 R. I. 169, 91 Am. St. Rep. 629, 49 Atl. 704, 55 L. R. A. 118; *Walker v. Great Northern Ry. Co.*, 28 L. R. Ir. 69. Nor can an action be maintained by any relative of a child *en ventre sa mere* for causing its death: *Gorman v. Budlong*, 23 R. I. 169, 91 Am. St. Rep. 629, 49 Atl. 704, 55 L. R. A. 118.

It is doubtless true that a bill may be maintained on behalf of a child *en ventre sa mere* when necessary for its protection, as for an injunction to stay waste, but the cases containing an affirmance of this doctrine seem, on examination, to be dicta merely: *Wallis v. Hodson*, 2 Atk. 115; *Musgrave v. Parry*, 2 Vern. 710.

h. To Judicial Proceedings.—The application to judicial proceedings of the rule that a child *en ventre sa mere* must be deemed in being for all purposes for its benefit must give rise to great doubt and uncertainty respecting all title founded on such proceeding, where it is possible that a child may be born after the commencement of the suit who, if born before, should have been a party thereto. If such child, though *en ventre sa mere*, may be regarded as not in esse, then the question of when and how it may be bound by a suit falls within the rules stated by us in note to *Rutledge v. Fishburne*, 97 Am. St. Rep. 762. If, on the other hand, it must be deemed in esse as soon as it becomes a child *en ventre sa mere*, those rules do not necessarily apply. The principal case does not affirm that the child may not be bound by representation as if not in esse, but does affirm that the parties before the court in that case could not be deemed to represent the unborn child, for the reason that its interests were adverse to theirs. All the cases in the state courts, coming within our observation, where a judgment was sought to be asserted against a child *en ventre sa mere* when the action in which it was rendered was commenced, have held that the child was not bound by such judgment because not a party thereto, nor, in contemplation of law, represented by the parties:

Detrick v. Migatt, 19 Ill. 146, 68 Am. Dec. 584; *McConnel v. Smith*, 39 Ill. 279; *Botsford v. O'Conner*, 57 Ill. 72; *Breit v. Yeaton*, 101 Ill. 242; *Giles v. Solomon*, 10 Abb. Pr., N. S., 97; *Deal v. Sexton*, 144 N. C. 157, ante, p. 943, 56 S. E. 691; *Pearson v. Carlton*, 18 S. C. 47. Opposed to them stands the decision of the supreme court of the United States in *Knotts v. Stearns*, 91 U. S. 638, 23 L. ed. 252, affirming that a decree of court directing the sale of real property for the purpose of converting it into funds, the income of which should be applied to the support of a mother and her children was binding on a child then *en ventre sa mere*, where its mother and all the children then born and living were parties to the suit. The court said: "The widow gave birth to a posthumous child in May following the death of her husband; and the validity of the decree is assailed because this unborn child was not made a party, nor its interests specifically considered, in the previous proceedings in the suit. The decree, after ordering a sale of the property, also provided for the investment of the proceeds in bonds or stock of the Confederate states, or of any state belonging to the Confederacy, or of the city of Richmond. The proceeds were invested in bonds of the Confederacy, and the investment was approved by the court. It is now contended that the decree of sale was invalid because of the direction of the investment of the proceeds, and the subsequent approval of the investment made; the counsel of the appellants insisting that aid was thus directly given to the Rebellion. These two grounds constitute the principal objections to the decree. Neither of them, in our judgment, affects the validity of the sale. The posthumous child did not possess, until born, any estate in the real property of which his father died seised which could affect the power of the court to convert the property into a personal fund, if the interest of the children then in being, or the enjoyment of the dower right of the widow, required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition. That property had then ceased to be realty; it had become, by the sale, converted into personalty. All that was then required for the protection of his interest in it was the appointment of a guardian to take possession of his proportion; and such a proceeding was had. A guardian was appointed; and upon a supplemental bill the original decree was so far modified as to provide for the child having an equal interest in the fund obtained with the other children. But there is another answer to the objection. Assuming that the child, before its birth, whilst still *en ventre sa mere*, possessed such a contingent interest in the property as required representation in the suit for its sale, he was thus represented, according to the law which obtains in Virginia, by the children in being at the time who were then entitled to the possession of the estate. Parties in being possessing an estate of inheritance are there regarded as so far representing all persons, who, being afterward born, may

have interests in the same, that a decree binding them will also bind the after-born parties."

We believe this decision to be maintainable on the ground that the law does not contemplate that there shall be a cause or a combination of circumstances in which a party is entitled to relief, and which the courts are not competent to entertain, though they have not the means of bringing some party contingently interested before them by the service of process, and that whenever every living person who can properly be made a party is before the court, then it is authorized to effectively exercise its jurisdiction: *Basnet v. Mixon*, L. R. 20 Eq. 182, 44 L. J. Ch. 557, 23 Week. Rep. 945. The weakness of the opinion in the principal case, in our judgment, is that the court does not suggest, nor are we able now to suggest, that any person who could properly have been made a party was omitted from the suit. It must be conceded that if there was such a party, though he was merely an executor acting in his representative capacity, and if in such capacity he could be deemed to represent a child *en ventre sa mere*, then a judgment without making him a party was void as against it, for in such circumstances it was not a party either directly or by representation: *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28 L. ed. 1015.

The court in the principal case suggests that the child was not made a party by the appointment of a guardian ad litem or otherwise, either before or after her birth, but there is no authority, as we understand the law, for the appointment of a guardian ad litem except by a court having jurisdiction of the party over whom the guardian is appointed. Hence, it is not probable that the court could have given itself jurisdiction by such an appointment. Even had it been made, the evidence might have failed to disclose the existence of a child *en ventre sa mere*, or might have justified, or even required, a finding that no such child existed, and, so far as the record shows, there was no person or officer whom the court could regard as a representative of the child, unless it was the parties before the court. It is true that their interests were adverse to that of the child, if child there were, but this is a feature which must attend every suit for partition, for the proper parties to such a suit are all actors and are deemed to be adverse to one another. We can think of no proceeding which the court could have taken anterior to pronouncing the judgment involved in the principal case by bringing in new or additional parties which would have given it jurisdiction over the unborn child, if that jurisdiction did not already exist: *Harper v. Archer*, 4 Smedes & M. 99, 43 Am. Dec. 472; *Marsellis v. Thalhimer*, 2 Paige Ch. 35, 21 Am. Dec. 66.

The doubts arising out of the principal case and the cases in other states involving the same question, and perhaps even out of the latest decision cited by us from the supreme court of the United States, are such that in every case assuming to authorize the parti-

tion or other disposition of property in which it is possible that there may be a child en ventre sa mere against whom, after its birth, it may be necessary to assert the judgment, the court should pause until this possibility has terminated, and that, failing to do so, no third person should purchase the property or otherwise assume any position in which he could be injured if the judgment should prove not to be assertable against such child, if born. Perhaps the difficulty may be avoided by the court assuming that there is a child en ventre sa mere and setting aside some fund or portion of the property for its benefit and thus escaping the effect of a decision like that in *Monarque v. Monarque*, 80 N. Y. 320. This is practically the course pursued in *The George and Rickard*, L. R. 3 Ad. & E. 466, 24 L. T. 717, 20 Week. Rep. 245, where the court reserved the right of a child supposed to be en ventre sa mere to present its claims, if born, within due time. The difficulty with this mode of procedure is that in the vast majority of cases the parties will be prepared to prove that there is no person not before the court who can have any interest in the proceedings, and the court, if it sets aside any fund or property except to the persons before it, must proceed contrary to the evidence, and to some extent in violation of their rights, or, in other words, must do something which upon the facts as they appear to it ought not to be done, or must, at least, postpone doing what under the law and the facts as established ought to be done at once.

E. F. MAIN COMPANY v. FIELD.

[144 N. C. 307, 56 S. E. 943.]

TRIAL—Issues Presented to the Jury, When Sufficient.—If, under the issues presented to the jury by the court, each party has an opportunity to offer evidence bearing upon every phase of the controversy, then the issues so presented are sufficient. (p. 957.)

TRIAL—Issues Which Should be Submitted.—Those material matters which are alleged on one side and denied on the other should be submitted in the form of issues to the jury, and this applies to new matter alleged in the answer and not mentioned in the complaint. (pp. 957, 958.)

SALE—Agreement Limiting Time Within Which the Purchaser Must Complain of Inferior Character of the Articles Furnished.—It is probable that the limit of two days for the inspection of an article furnished will be held reasonable when the defects are of a character which would be disclosed by an ordinary inspection, but if the defects are latent, no such limitation will protect the seller. Under such circumstances, the buyer has a reasonable time in which to ascertain the quality of his purchase, and what is a reasonable time is a question of fact dependent upon the circumstances of each case, to be determined by the jury. (p. 959.)

SALE—Failure to Notify the Seller by a Registered Letter of Defects in the Articles Sold.—Though the contract of sale stipulates that if defects are found in the article sold, the purchaser must notify the seller by registered letter, it is not material that notice was not given by such letter, if it appears that the seller received the purchaser's communication and refused to take back the goods or remedy the trouble. (p. 959.)

SALE, Evidence that Contract of was Obtained by False and Fraudulent Representations, When Sufficient.—If the evidence tends to show that the goods were apparently all right and up to the sample, and that their appearance was such as was calculated to deceive, and that in fact the goods were worth nothing, and that the seller, being informed, refused to remedy the defects, such evidence sustains a finding or verdict that the contract was obtained by false and fraudulent representations. (pp. 959, 960.)

IN SALES BY SAMPLE There is an Implied Warranty that the bulk shall be equal to the sample, and also where the goods are sold without opportunity for inspection, that they shall be at least merchantable. (p. 960.)

SALE, Right of Purchaser to Rescind.—If goods are sold by sample, and on being supplied do not correspond with it and are of no value, and the seller is notified of the defects and given an opportunity to remedy them, then the purchaser is entitled to rescind the sale. (p. 960.)

Action before a justice of the peace to recover for goods sold and delivered. The following are the issues submitted and the responses thereto:

“1. Was the contract set out in the complaint obtained from defendants by the false and fraudulent representation of plaintiff? A. Yes.

“2. What was the value of the goods sold and delivered by plaintiff to defendants? A. Nothing over freight.

“3. Did defendants notify plaintiff of defects in the goods and give him opportunity to remedy any defects? A. Yes.

“4. What amount, if any, is plaintiff entitled to recover of defendants? A. Nothing.”

McLean, McLean & McCormick, for the plaintiff.

Maxey L. John, for the defendant.

308 BROWN, J. 1. The plaintiff tendered the following issue: “What is the amount due under the contract?” and excepted to the issues submitted. We think the issues passed upon by the jury are entirely responsive to the allegations of the pleadings, and that under them each party had the opportunity to offer evidence bearing upon every phase of the controversy. Those material matters which are alleged on the one side and denied on the other should be submitted in the form of issues to the jury, and this applies to new

matter alleged in the answer and not mentioned in the complaint: *Shaw v. McNeill*, 95 N. C. 535; *Owen v. Phelps*, 95 N. C. 286. An examination of the answer discloses that the matters embodied in the issues submitted are all pleaded with particularity in the answer of the defendants.

2. It is contended that the defendants did not comply with the stipulations of the written contract under which they purchased. A contract almost identical in its terms with the one sued on here was before the court in *Main Co. v. Griffin*, 300 141 N. C. 43, 53 S. E. 727, in which it was held that the defendants must comply with the warranty and exchange plan, and that plaintiff was entitled to notice of alleged defects and an opportunity to remedy them before the defendants could repudiate the entire contract. In reference to the provisions of said contract, this court said: "According to the terms of this obligation, the plaintiff was entitled to notice of any alleged defect in the goods as to the quality, and to be given an opportunity to remedy any deficiency before defendants could repudiate the entire contract." The facts of that case were materially different from this. It appeared there that the defendant received the goods promptly and made no complaint, the court saying in reference thereto: "But defendants' own evidence shows that no complaint whatever of any defects in the jewelry was ever made by defendant from the date of the receipt of it to the time of the trial. On the contrary, on June 16, 1902, defendant notified plaintiff that 'goods just received and found all O. K.' " In respect to these defendants' conduct after receipt of the jewelry, J. T. Field testified as follows: "We sold some of it and it was brought back in a short time, brassy—no gold about it. We took it back and refunded the money. As soon as we found out what it was we notified them that it was worthless, and asked them to take it back. They refused to take it back. It was not worth anything; I would not have it. To sell this stuff would ruin a man's business."

It is true that the contract contains a provision that all right to make claim that goods are not like sample, or not according to order, are waived unless such claim is sent by registered mail within two days of receipt of goods; and it is likewise true that there is no evidence that the defendants made claim within two days after receipt of the goods. The courts have very generally recognized the right of par-

ties to a contract ³¹⁰ for the purchase and future delivery of merchandise to contract in reference to the time and place of inspection, and such stipulation is generally enforced. It is probable that a limit of two days for inspection would be held reasonable where the defects are of a character that may be disclosed by an ordinary inspection, but where, as in this case, the defects are claimed to be latent, and such as are not readily discoverable by inspection, no such limitation will protect the seller. Under such circumstances the buyer's right of inspection includes a reasonable time within which to ascertain the quality of his purchase. What is a reasonable time here is a question of fact dependent upon the circumstances of each case and to be determined by the jury: 2 Mechem on Sales, secs. 1377-1381, and cases cited. We are of opinion that, if the evidence is to be believed, the defendants acted with due diligence in making inspection and notifying plaintiff. It does not appear whether they did so by registered letter, but that is immaterial here, as it appears in evidence that plaintiff received defendants' communication and refused to take the goods back or remedy the trouble.

3. It is contended that there is no evidence sufficient to warrant the finding upon the first issue, that the contract was obtained by the false and fraudulent representation of plaintiff. There is evidence tending to prove that the goods were apparently all right and up to sample, and that their appearance was such as was calculated to deceive. One witness testified that the goods were "cheap made-up stuff for fake purposes, and worth nothing as jewelry." It may be that there is no evidence that the contract was secured by false representation by plaintiff's agent, or that he was inspired by a fraudulent purpose when he obtained the execution of the contract. We are willing to admit that there is no evidence of such antecedent fraudulent purpose at the time the contract ³¹¹ was signed, and that plaintiff's agent proposed that the order should be filled in good faith. Yet the jury have found that the goods were worth nothing; that plaintiff was duly notified and refused to remedy the defects. Such findings in response to the second and third issues are amply sufficient to support the judgment of the court. The goods were purchased by sample, and the findings of the jury establish the fact that the goods when delivered not only did not come up to sample, but were

unmerchantable and worthless, and that plaintiff refused to remedy the defects. In all sales by sample there is an implied warrant that the bulk shall be of equal quality to the sample: Benjamin on Sales, 683. It is also held that where goods are sold without an opportunity for inspection, there is also an implied warranty that they shall be at least "merchantable"—not that they are of the first quality, or even of the second, but that they are not so inferior as to be unsalable among dealers in the article. This is especially true where, as in this case, the vendor is the manufacturer of the articles sold: Benjamin on Sales, 686, and cases cited. "If a man sells an article," says Best, C. J., in *Jones v. Bright*, 5 Bing. 544, "he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose." Lord Ellenborough said in *Gardiner v. Gray*, 4 Camp. 144, "under such circumstances the purchaser had a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract." In *McClung v. Kelly*, 21 Iowa, 508, it is said: "The contract always carries with it an obligation that the article shall be merchantable; at least not to have any remarkable defect." In *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, it is said: "A contract to manufacture and deliver an article at a ³¹² future day carries with it an obligation that the article shall be merchantable": See, also, *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290.

Upon the findings of the jury in response to the second and third issues, we have no hesitation in holding that under such conditions the right of defendants to rescind the contract and to lawfully refuse payment is undeniable: 24 Am. & Eng. Ency. of Law, 1161.

We have examined the exceptions in the record and find no error.

On Implied Warranties in Sales by sample see the note to Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 612-614.

JOHNSON v. WESTERN UNION TELEGRAPH COMPANY.

[144 N. C. 410, 57 S. E. 122.]

CONFLICT OF LAWS—Telegraph Corporations.—If a Message is Delivered to a Telegraph Corporation in One State to be Transmitted to Another, the liability of the corporation thereunder must be determined by the laws of the former state. (p. 962.)

CONFLICT OF LAWS—Contract to be Partly Performed in Two States.—If a contract is made in one state to be performed in another, the law of the latter controls, but if the contract is to be partly performed in one state and partly in another state or country, the law of the place where made controls, unless a clear, mutual intention is manifested that it shall be controlled by the law of some other country. (p. 964.)

CONFLICT OF LAWS—Telegraph Corporations.—Mental Suffering not being allowed as an element of damages in Virginia, one who delivers a message to a telegraph corporation in that state to be transmitted and delivered in North Carolina cannot, on the breach of the contract, recover thereon in the latter state for mental suffering, though such a recovery is permitted by the laws upon like contracts made therein. (p. 966.)

Winston & Bryan, for the plaintiff.

Fuller & Fuller, for the defendant.

⁴¹¹ BROWN, J. The exact question presented for decision has been considered and decided in this state adverse to plaintiff's contention, and following such decision the court below should have granted the defendant's motion, it being admitted that there is no other evidence of damage except that arising from mental suffering alone: Bryan v. Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938. In that case a telegram of similar character was sent to the plaintiff at Wedgefield, South Carolina, from Mooresville, North Carolina. The message was promptly transmitted to Wedgefield but was never delivered, the operator there wiring back, "Party unknown." The plaintiff came over to North Carolina and brought suit against the telegraph company for damages for mental anguish. It was admitted that at that time she could not recover such damages in South Carolina. This court held that the contract having been made in North Carolina, damages must be assessed according to the law of North Carolina, and the plaintiff was permitted to recover in our courts for her ⁴¹² mental suffering.

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The case was first decided at August term, 1902, upon appeal from a judgment of nonsuit in the superior court. A per curiam judgment was rendered affirming the judgment of the superior court. At August term, 1903, the cause was reheard, and after mature deliberation the former judgment was reversed in an elaborate and forceful opinion by Chief Justice Clark. In referring to the question involved in the case at bar, the learned judge says: "The last objection is that the wrong, if any, occurred in South Carolina, and is to be tried by the laws of that state, which it is alleged did not at that time allow the recovery of damages for mental anguish. A case exactly in point is *Reed v. Telegraph Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, 34 L. R. A. 492, which holds that 'if a telegraph message is delivered to the company in one state, to be by it transmitted to a place in another state, the validity and interpretation of the contract, as well as its liability thereunder, is to be determined by the laws of the former state.' The contract was made at Mooresville in this state; it is a North Carolina contract, and damages for its breach are to be assessed according to the liability attaching to such contract under our laws. The code, section 194 (2), authorizes an action against a foreign corporation 'by a plaintiff, not a resident of this state, when the cause of action shall have arisen . . . within this state.' "

It is manifest that the fact that the plaintiff, a nonresident, came to this state and brought suit makes no difference between that case and the case at bar. The principles of law governing the case are the same, whether the suit is brought in our courts by a resident of this state or a nonresident who comes here and institutes his action under our code: *Cannaday v. Atlantic C. L. R. R. Co.*, 143 N. C. 439, 118 Am. St. Rep. 82, 55 S. E. 836, 8 L. R. A., N. S., 939.

The learned counsel for the plaintiff was evidently inadvertent ⁴¹³ to Bryan's case (133 N. C. 603, 45 S. E. 938), when he stated that this question is now presented here for the first time. In that case it is distinctly held that it is a North Carolina contract, and damages must be assessed under our laws and not under the laws of South Carolina, where the breach occurred. This doctrine was reaffirmed and Bryan's case cited and approved by this court, as at present constituted, in *Hancock v. Western Union Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403, in the following

language: "If a telegraphic message is delivered to the company in one state to be transmitted by it to a place in another state, the validity and interpretation of the contract, as well as the rule measuring the damages arising upon a breach and the company's liability therefor, are to be determined by the laws of the former state, where the contract originated." It is true that the telegram in that case originated in Maryland and was sent into Virginia, both of which we now know do not recognize the mental anguish doctrine. But it is to be noted that in Hancock's case (137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403) there was no evidence that Virginia did not recognize such doctrine, and the case was decided solely upon the law of Maryland. This further appears on the second hearing of the case: 142 N. C. 163, 55 S. E. 83.

Thus we see that the principle laid down in Bryan's case (133 N. C. 603, 45 S. E. 938), was settled upon after mature consideration upon a rehearing, and has been reaffirmed subsequently by a unanimous court in Hancock's case (137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403), and later in an elaborate opinion by Justice Hoke in Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50. The weightiest considerations should move the court to adhere to its decisions unless it clearly appears that they are wrong. As is well said by Mr. Justice Walker in Hill v. Atlantic & N. C. R. R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A., N. S., 606: "The doctrine of stare decisis, commonly called the 'doctrine of precedents,' has been firmly established in the law. It means that we should adhere to decided cases and settled principles, and not disturb matters which have been established by judicial determination."

⁴¹⁴ The opinion of the chief justice in Bryan's case (133 N. C. 603, 45 S. E. 938) is supported by abundant authority, although we admit the cases and text-writers are not in accord. The contract entered into at Danville for the benefit of this plaintiff may be regarded as a continuous and indivisible contract, the performance of which may run through several states. It was entered into in Virginia and partially performed in that state. The case of Reed v. Western Union Tel. Co., 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, 34 L. R. A. 492, cited by the chief justice in Bryan's case (133 N. C. 603, 45 S. E. 938), is a direct authority for his position, and is a case where the telegram

was sent from Iowa to Missouri. In the opinion it is said: "The contract was made in Iowa, and according to the terms was to be partially performed in that state." Again: "Does the circumstance that it was to be partially performed in Missouri exempt it from the laws of Iowa? We think most clearly not." In *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574, goods were shipped under contract from New York to Boston. They were burned in Boston under circumstances which freed the carrier from liability under the laws of Massachusetts. The New York court applied the laws of New York, where the contract was made, and held defendant liable. To the same effect is *Hartman v. Louisville & N. R. R. Co.*, 39 Mo. App. 88. Mr. Page, in his work on "Contracts," recognizes the doctrine laid down in the *Reed* case (135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, 34 L. R. A. 492), for, after stating that it has been held that the law of each place of partial performance governs, he says: "On the other hand, it has been said that if a contract is to be performed in part where made and in part elsewhere, the law of the place where it is made and performed in part will control, etc."

Where the contract is made in one state to be fully performed in another, the law of the latter governs. "This rule is founded," says the supreme court of Wisconsin, ⁴¹⁵ "on the idea that in making a personal contract to be fully performed in another state, the parties must have had the law of that state in view. But if the contract is to be partly performed where made and partly in other countries or states, the law of the place where it is made will still govern, unless a clear mutual intention is manifested that it shall be governed by the law of some other country": *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703. To same effect are *Liverpool etc. S. Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. ed. 788; *Morgan v. New Orleans etc. R. R. Co.*, 2 Wood, 244, Fed. Cas. No. 9804; *Hudson v. Northern Pac. R. R. Co.*, 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; *Illinois C. R. R. Co. v. Bebee*, 174 Ill. 13, 66 Am. St. Rep. 253, 50 N. E. 1019, 43 L. R. A. 210; *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, and note, 31 N. E. 581; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363.

The principle declared in *Bryan's* case (133 N. C. 603, 45 S. E. 938), and reaffirmed in *Hancock's* case (137 N. C.

497, 49 S. E. 952, 69 L. R. A. 403) and in Hall's case (139 N. C. 369, 52 S. E. 50), is expressly maintained by the supreme court of Texas in *Western Union Tel. Co. v. Waller*, 96 Tex. 589, 97 Am. St. Rep. 936, 74 S. W. 751, wherein it is held: "Where a telegraph message is delivered to the company at a point in Texas for transmission to a point in Indian Territory, the damages for mental anguish suffered by the addressee, owing to delay in the delivery of the message in the Indian Territory, may be recovered in Texas, though such damages are not recoverable in the Indian Territory." In a later case the same court held that "where a message was given to a telegraph company in Arkansas and transmitted to its destination in Texas, where the agent negligently failed to deliver the same to the addressee, a recovery is governed by the laws of Arkansas, and damages for mental anguish, not being recoverable there, cannot be recovered in a suit in Texas": *Western Union Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 437, 80 S. W. 561. Both of these cases refer to antecedent cases in the same court, holding the same doctrine, and they also refer to and ⁴¹⁶ rely upon the leading case of *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, 34 L. R. A. 492, cited by the chief justice in his opinion in the Bryan case, and are based upon the doctrine that "contracts are to be governed by the law of the state where entered into, unless a different intention is expressed or implied by the contract": *Western Union Tel. Co. v. Christensen* (Tex. Civ. App.), 78 S. W. 744.

It will be observed that the decisions of this court are on all-fours with the above-quoted Texas cases. In the Bryan case (133 N. C. 603, 45 S. E. 938) the telegram originated in North Carolina and was sent to South Carolina, where the breach occurred. The law of North Carolina was applied. In the Hall case (139 N. C. 369, 52 S. E. 50), which is in every respect identical with the case at bar, the telegram originated in Virginia and was sent to North Carolina, where the breach occurred and where the suit was brought. The law of Virginia was applied by Mr. Justice Hoke, who, speaking for a unanimous court, said: "The complaint averring that the contract was made in Virginia, the rights of the parties will be determined by the laws of Virginia so far as the same apply." The learned justice cites and approves both the Bryan (133 N. C. 603, 45 S. E. 938) and

the Hancock cases (137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403).

The *lex loci solutionis* seems to apply to those contracts made in one country and to be wholly performed in another, indicating thereby two distinct places of contract, one where it is entered into, and the other where it is to be entirely performed. *Locus, ubi contractus celebratus est; locus, ubi destinata solutio est.* It may be said that the law of the place governs only as to the validity and interpretation of the contract, and not as to the means of enforcing it or compensating for its breach. The *lex loci* seems to embrace more than that. It is said in 9 Cyclopaedia, 668: "This law (of the place) governs not only as to its execution, authentication and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, ⁴¹⁷ satisfaction or discharge": *Davis v. Morton*, 5 Bush, 160, 96 Am. Dec. 345. The supreme court of Indiana holds that the law of the place includes the remedy there given for its breach, but does not interfere with a question of legal procedure, which is governed by the *lex fori*: *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 31 N. E. 581. The supreme court of the United States says: "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement." Again: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than its means of enforcement. This is the breath of its vital existence": *Edwards v. Kearzey*, 99 U. S. 595, 24 L. ed. 793. The court evidently was governed by these and similar cases when it held in *Bryan's case*, as well as *Hancock's* and *Hall's cases*, that the law of the place included the question of damage as well as the validity and interpretation of the contract. While we recognize that respectable authority may be found militating against the position this court has heretofore taken, we do not feel that we should depart from the precedents we have already made.

Reversed.

A Contract Made in One State to be performed in another state is governed by the law of the latter. But a contract which is to be performed partly in the state where made and partly in another state is governed by the law of the former: Swedish-American Nat. Bank v. First Nat. Bank, 89 Minn. 98, 99 Am. St. Rep. 549, and cases cited in the cross-reference note thereto.

The Liability of Telegraph Companies for damages due to mental suffering is discussed in the recent note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 301.

GREENWOOD v. SOUTHERN RAILWAY COMPANY.

[144 N. C. 446, 57 S. E. 157.]

WATERS.—A Railroad Company does not Owe to the Owner of Real Property adjacent to its right of way the duty of providing ditches sufficient to collect and carry off all surface water that comes down from the land above in its natural flow. (p. 969.)

WATERS.—The Lower Proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom. (p. 969.)

WATERS.—A railroad corporation is not liable for not keeping open side ditches constructed by it for the purpose of diverting and carrying off water coming down from above. Though it allows such ditches to fill up and thereby lets water from land above sweep across its track and flow in its natural course upon lands below, the owner of the latter cannot recover damages, there being no charge that the railroad by its track obstructed or diverted the natural flow of the stream. (p. 969.)

J. F. Hendren and W. L. Reece, for the plaintiff.

Manly & Hendren, for the defendant.

446 CLARK, C. J. Action for damages to the bottom lands of the plaintiff by water overflowing the track of the defendant and ponding thereon. The allegations of negligence are that the defendant had negligently permitted and allowed the ditch on its right of way on the north side of the track, where it passed over the plaintiff's land, to remain filled up and unopened, and the ditch was necessary to divert and carry off the water flowing onto the right of way; that by reason of the ditch being so filled up and remaining unopened, water overflowed the track, and ponded itself on his bottom lands on the south side of the track, cutting washes in the land and leaving a deposit on the land of sand, gravel and other substances injurious to the soil. There is

no allegation that the embankment caused the water to be obstructed in its flow and therefore pond on his upland.

The hill land lying to the north consists of some six or seven acres that drained into a ravine ending some seventy-five feet from the track, and the water that had collected in this ravine from the six or seven acres, both cultivated and ⁴⁴⁷ uncultivated, after following the course of the ravine to its end, then flowed into a ditch or gulley which began at the end of the ravine and continued toward the track, and emptied all the water so collected on the right of way, about half-way between the outer edge of the right of way and the side ditch.

At a point opposite where the water was so emptied onto the right of way the land was practically level and formed a watershed, and it was at this point that the water would flow over the track onto plaintiff's bottom lands to the south. Beginning at this point, the defendant had cut a side ditch, one to the east and one to the west. As originally cut, and when opened, the ditch began at a depth of about twelve inches, and as it continued along the side of the track got deeper and deeper, until, at the point where it emptied into a natural water channel, it was some five or six feet in depth. The evidence disclosed that this side ditch would be filled up with dirt, trash, etc., coming down from plaintiff's land through the ravine and ditch, and when so filled up would remain in that condition for periods of time, long and short. The side ditch was properly and carefully constructed, and, when not filled up by the dirt and trash from plaintiff's land above, provided ample drainage for the right of way, but was not sufficient, even when not filled up, to carry off all the water that came down through the ravine in hard rains. Practically all the water that flowed into this side ditch, or onto plaintiff's land south of the road, came from his lands above.

There was testimony to the effect that to cut a ditch sufficient to carry off all the water that came upon the right of way it would have to be begun so deep at its beginning that when it reached its output it would be so deep as to seriously impair the usefulness and safety of the roadbed. It was ⁴⁴⁸ also in evidence that a ditch could not be made that would not fill up with the dirt and trash brought down from the land above during a hard rain.

There was also evidence tending to show that the plaintiff could, at a reasonable cost, cut a ditch on the south side of the track, and thus prevent the water that broke over the track from sobbing his bottom land.

There was a verdict for the plaintiff. Exception and appeal by the defendant.

The exceptions are to the charge only. His honor erred in instructing the jury that "the defendant owed to the plaintiff the duty to provide side ditches sufficient to collect and carry off all surface water that came down from the land above in its natural flow," and was responsible for any damages the plaintiff sustained by reason of the defendant's ditches being insufficient to carry off the water coming down from above in its natural flow, and refused to charge, as requested, that it did not owe such duty to the plaintiff.

It is settled that the lower proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom. The owner of the upper land may accelerate the flow of the water, but cannot divert it: *Porter v. Durham*, 74 N. C. 767. This is true as between the defendant and the plaintiff as owner of the land above the railroad track, and it is equally true as between the defendant and the plaintiff as the owner of the land below the railroad.

The defendant, had it so chosen, might by its side ditches have caught the water coming down from the plaintiff's ⁴⁴⁹ land above its track and led it to be discharged at another point—if the owner of the land at such point did not object. But there is no allegation or proof that the defendant has obstructed or diverted the natural flow of the water coming from above and poured it upon the plaintiff's land. The plaintiff has no legal ground for his complaint, which is that the defendant has not kept open side ditches to divert and carry off the water coming down from above, but, permitting the ditches to fill up, has let the water from the plaintiff's land above sweep across its track, unimpeded, and flow in its natural course upon the plaintiff's land below.

Error.

If a Railroad Company Fails to Provide a Sufficient Drain or outlet through its right of way to afford a reasonably prompt passage for the surface water seeking outlet there in times of heavy or long-continued rainfall, it is liable to adjoining land owners for the overflow of their property resulting therefrom: *Harvey v. Mason City etc. R. R. Co.*, 129 Iowa, 465, 113 Am. St. Rep. 483, and see the cases cited in the cross-reference note thereto.

McIVER v. YOUNG HARDWARE COMPANY.

[144 N. C. 478, 57 S. E. 169.]

SALES.—The Essence of a Sale is a transfer of property in a thing from the seller to the buyer for a price. (p. 974.)

CORPORATIONS—Transfer by One to Another, When Invalid. Directors of a corporation, though they are also stockholders, cannot sell its property to anyone for their own benefit to the prejudice of its creditors. Hence, they cannot sell practically the entire property of the corporation upon a consideration moving to themselves. (p. 974.)

CORPORATIONS—Liability of Officers and Stockholders.—The stockholders and officers of a corporation are liable to it and its creditors for any acts of malfeasance, misfeasance or nonfeasance by which their rights are injuriously affected, and, as a consequence, for any loss arising out of their fraud or negligence. (p. 974.)

CORPORATIONS—The Trust Fund Doctrine.—While, as between itself and its creditors, a corporation may be regarded simply as a debtor, still, as between its creditors and its stockholders, its assets are considered in equity as a fund for the payment of debts, and cannot be diverted from that purpose for the benefit of the latter, no matter what the form of the transaction by which the scheme of the transfer is consummated. (p. 975.)

CORPORATIONS—Conveyance by One to Another, When Deemed Fraudulent.—A sale by one corporation to another in consideration of the latter's delivering a specified amount of stock to the individual shareholders in the selling corporation and guaranteeing the payment of its debts is prima facie fraudulent as to the creditors of the selling corporation. (p. 977.)

CORPORATIONS, Directors of, When Answerable for Its Debts Because They have Disposed of Its Assets for Stock in Another Corporation.—If the directors of a corporation in its behalf sell its assets to another corporation in consideration that the latter will issue to them a specified amount of its stock and pay the debts of the selling corporation, such directors, having disposed of its property wrongfully, are personally liable for the debts of such corporation, the property so disposed of having been of sufficient value to pay such debts, and the creditors cannot be compelled to accept the stock so agreed to be paid. (p. 979.)

A CORPORATION cannot be Regarded as a Bona Fide Purchaser for Value, without notice, when another corporation sells to it its assets in consideration that the purchaser will make payment by assuming the debts of the selling corporation and by issuing a specified amount of its stock to the directors authorizing such sale. (p. 979.)

CORPORATION, Purchaser of Assets of One, When Becomes Answerable for the Latter's Liabilities.—If one corporation sells its assets to another in consideration of the agreement of the latter to issue its stock in a specified amount to the directors of the selling corporation, the purchasing corporation and the directors of the selling corporation are jointly and severally liable to the receiver of the selling corporation for the payment of its liabilities, the property so sold having been of sufficient value to make such payment. (p. 980.)

CORPORATION, Receiver of, Recovery of is Limited to the Amount Necessary to Satisfy Its Creditors.—Where the receiver of an insolvent corporation sued another corporation, which had also become insolvent, claiming the right to recover on the ground that the corporation of which he is receiver sold almost its entire assets to the other corporation in consideration of the agreement that the purchasing corporation would pay the debts of the selling corporation and issue stock to the stockholders of the latter of a specified amount, such sale is a fraud on the creditors of the selling corporation, and such receiver, for their benefit, may maintain a suit in equity against the purchasing corporation in the hands of the receiver of another corporation and prove against it the value of the goods purchased, but is not entitled to receive more than will satisfy the creditors of the selling corporation. No recovery can be had on behalf of the stockholders beyond the amount necessary to satisfy the creditors, when such stockholders have participated in the benefit of the illegal transaction, and thereby estopped themselves from questioning it. (pp. 980, 981.)

CORPORATIONS, Fraudulent Transfer from One to Another Though There is No Fraudulent Intent.—Where one corporation transfers its assets to another in consideration of an agreement that the latter will pay a specified sum on its capital stock to the stockholders and directors of the former in consideration of the liabilities of the selling corporation, the transaction is fraudulent as to its creditors, though no actual fraudulent intent can be imputed to the parties. (p. 982.)

CORPORATION—Liability of Stockholders, When not Affected by Charter Provisions.—The provision in the charter of a corporation that no stockholder shall be liable for any debt, liability, contract, tort, omission or engagement of the corporation or other stockholder therein does not prevent the stockholders from being held liable as officers or directors for a joint tort or misfeasance committed by them to the prejudice of creditors. (p. 982.)

John W. Hinsdale and Seawell & McIver, for the plaintiff.

W. J. Adams, Womack, Hayes & Bynum, for the defendant.

479 WALKER, J. The Sanford Hardware Company is a corporation chartered by this state in June, 1900, with an authorized capital of \$4,500, of which \$3,000 has been paid in, and had its place of business at Sanford, North Carolina. The Young Hardware Company was also chartered by this state, and had its place of business at Raleigh, North Carolina, both having been engaged in the hardware business. The Sanford corporation became insolvent, and, in a judgment creditor's suit against it to subject its assets to the payment of its debts and liabilities, the plaintiff, D. E. McIver, was appointed receiver, and, as such, he brings this action.

The case was tried by consent without a jury, and the court found substantially the following facts: The plaintiff, ⁴⁸⁰ D. E. McIver, was duly appointed, in April, 1905, receiver of the Sanford Hardware Company, with the usual powers; the defendants Bynum and Clark were the president and secretary and treasurer of the company, and they, with Terry, were its only stockholders and directors. Terry, Bynum and Clark, finding that the company was not making money, sold to the Young Hardware Company the entire stock of goods of the Sanford Hardware Company at the price of \$2,000, its then value, taking in payment therefor capital stock of the former company of the par value of \$2,000, which was worth at the time fifty cents on the dollar, as they then well knew, and which is now absolutely worthless. Of this stock, according to the agreement between the parties, \$500 was issued directly to Terry, \$500 to Bynum, and \$500 to Clark. The remaining \$500 was retained by the Young Hardware Company until the Sanford Hardware Company's debts should be paid and has never been issued and delivered to the latter. It was thought, at the time, to be sufficient to pay the outstanding debts. The several defendants, after the appointment of McIver as receiver, and after the stock became worthless, tendered the stock of the Young Hardware Company, severally held by them, to the plaintiff, who declined to receive it. The debts of the Sanford Hardware Company, at the time of the transactions herein mentioned and at the present time, amount to about \$620. Some of its debts, not included in the \$620, have been settled by it since the transfer of its stock of merchandise. The Sanford Hardware Company retained a safe and typewriter, value not given, and some small articles, and certain book accounts now worth \$10 or \$15, which articles, with the stock of goods, constituted its entire assets. Creditors have reduced their claims to judgments, have issued executions, and the sheriff has returned the same "nothing to be ⁴⁸¹ found." All of the foregoing facts were known to all of the defendants at the time of the transaction. The Young Hardware Company is now insolvent and was so when this action was brought. The Sanford Hardware Company has never received from it, or from any source, any payment of money or other thing of value for the stock of goods delivered to the latter by Bynum, Clark and Terry. At the time of the said transactions, Bynum was president

of the Sanford Hardware Company and manager of the other corporation, but had no other interest in the latter until the \$500 of its stock was issued to him. The negotiations and trade with the Young Hardware Company were conducted by Bynum and Clark, by and with the knowledge and consent of Terry. When the offer was made for the stock of goods by the Young Hardware Company, Bynum, Clark and Terry consulted about it and accepted in writing the proposal to buy. At the time, though, the Sanford Hardware Company was not being pressed in any way by its creditors, and had not been. The transfer of the goods was made in November, 1904, in good faith, without concealment or fraud, and Bynum, Clark and Terry received nothing in the way of benefit from the transaction except the stock of the Young Hardware Company.

The charter of the Sanford Hardware Company provides as follows:

"With the consent, in writing and pursuant to the vote of the holders of a majority of the stock issued and outstanding, the directors shall have power and authority to sell, assign, transfer or otherwise dispose of the whole property of this corporation.

"No stockholder of the said corporation shall be individually liable for any debt, liability, contract, tort, omission or engagement of the said corporation or of any other stockholder herein."

⁴⁸² The company also had the general power to buy and sell real and personal property.

Upon the facts thus found by it the court adjudged that the plaintiff is only entitled to recover from the defendants A. P. Terry, A. J. Bynum, Jr., and A. M. Clark the certificates of stock held by them and issued to them by the Young Hardware Company; that he take nothing by his suit except the said certificate of stock, and that the defendants go without day and recover of the plaintiff their costs. Plaintiff excepted and appealed.

If we should concede that the transaction by which the transfer of the property of the Sanford Hardware Company to the Young Hardware Company was effected by Bynum, Clark and Terry was valid as a corporate act, and sufficient to pass the title to the latter company, as against creditors of the former company, unless there is some other objection to the transfer, we think it is so lacking in the essential

elements of a bona fide sale that, however regularly and formally those who were, at the time, stockholders and officers of the Sanford Hardware Company proceeded, no title to the property was ever acquired by the Young Hardware Company, so far as the creditors of the other corporation are concerned. The essence of a sale is the transfer of the property in the thing from the buyer to the seller for a price: *Tiffany on Sales*, pp. 1, 2. No price has been paid to the Sanford Hardware Company, which is an entity distinct from its corporators.

It was not competent for the directors of the Sanford Hardware Company, even though they were also stockholders, to sell its property to anyone for their own benefit⁴⁸⁸ and advantage and to the prejudice of its creditors, or, in other words, to sell practically the entire property of the corporation upon a consideration moving to themselves. It has been held that a director, who is also a creditor of a corporation, cannot prefer himself to the other creditors in the application of its assets to the security or payment of its debts: *Hill v. Pioneer Lumber Co.*, 113 N. C. 173, 37 Am. St. Rep. 621, 18 S. E. 107, 21 L. R. A. 560; *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765. The assets of a corporation are, in a certain sense, to be regarded as a trust fund, and the officers as occupying the position of fiduciaries, in respect to their duty toward creditors, charged with the preservation and proper distribution of those assets. The corporate debts must be paid before they can appropriate any part of the assets to their own use, though they may also be stockholders. The fund for the payment of dividends and for the redemption of the stock is what is left after the creditors have been satisfied. It is true that, subject to the exception already mentioned, the corporation, through its appointed officers and agents, may dispose of its assets just as an individual may deal with his property until, by reason of its insolvency, they are brought under the control of the court, when they will be distributed among the creditors ratably and upon the principle that equality is equity, subject, however, to the recognition and enforcement of any superior equitable rights or liens acquired beforehand, and which may entitle the holders thereof to be preferred with respect to them in the administration of the fund.

It is needless to enter upon any elaborate discussion of what is known as the "trust-fund doctrine" in order to define its true nature and to fix its limitations, for it is quite sufficient, for the purpose of deciding this case, that, as a part of that important doctrine, we find it to be settled that the stockholders and officers of the corporation are ⁴⁸⁴ liable to it and to its creditors for any acts of malfeasance, misfeasance or nonfeasance, by which their rights are injuriously affected, and, as a consequence, for any loss arising out of their fraud or negligence. If they have served themselves, directly or indirectly, instead of serving the corporation when their interests and those of the corporation or of its creditors conflict, they must answer for any loss resulting from their faithfulness and cupidity. While there is no direct and express trust attached to the corporate property for the benefit of its creditors, so that its assets cannot be conveyed by it or acquired by another except they be subject, in the hands of the purchaser, to the burden of a trust or lien, and therefore they can properly be called a trust fund only "by way of analogy or metaphor"; and while, as between itself and its creditors, the corporation may be regarded as simply a debtor, still, as between its creditors and its stockholders, its assets are considered in equity, as a fund for the payment of debts and cannot be diverted from that purpose for the benefit of the latter, no matter what the form of the transaction may be by which the scheme of diversion is consummated.

The principles we have thus generally stated are well sustained by numerous authorities: *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Hollins v. Brierfield, C. & S. Co.*, 150 U. S. 371, 14 Sup. Ct. Rep. 127, 37 L. ed. 1113; *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680; *Clayton v. Ore Knob Co.*, 109 N. C. 385, 14 S. E. 36; *Hill v. Pioneer Lumber Co.*, 113 N. C. 173, 37 Am. St. Rep. 621, 18 S. E. 107, 21 L. R. A. 560; *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765; *Thomson-Houston Electric Light Co. v. Henderson Electric Light Co.*, 116 N. C. 112, 21 S. E. 951; *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348; *Graham v. Carr*, 130 N. C. 271, 41 S. E. 379; *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, 35 L. ed. 227. In the last-cited case the subject is fully discussed and the cases bearing upon it are carefully

collated. Speaking of the obligation of directors arising out of this trust relation, Justice Davis, for the court, ⁴⁸⁵ in *Drury v. Milwaukee & S. R. R. Co.*, 7 Wall. 299, 19 L. ed. 40, says: "It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in receiving an advantage to themselves not common to the other creditors they were guilty of a plain breach of duty." Let it be noted that this was said of directors who were also creditors—sustaining the dual relation of trustees and creditors. We find the same idea thus clearly stated in 10 Cyclopaedia, pages 654, 655: "If the capital stock should be divided, leaving any debts unpaid, every shareholder receiving his share of the capital stock would in equity be held liable pro rata to contribute to the discharge of such debts out of the funds in his own hand. Accordingly, when the property has been divided among the shareholders, a judgment creditor, after the return of an execution against the corporation unsatisfied, may maintain a creditor's bill against a single shareholder or against as many shareholders as he can find within the jurisdiction, to charge him or them to the extent of the assets thus diverted, and it is immaterial whether he got them by fair agreement with his associates or by an act wrongful as against them. In affording relief to creditors of corporations on this ground, courts of equity proceed on the familiar principle that whoever is found in possession of a trust fund, under circumstances which charge him with knowledge of the trust, is bound to account as trustee to those beneficially interested in such fund. Whenever shareholders have in their possession any of this trust fund they hold it cum onere, subject to all the equities which attach to it, and they stand in such a relation of privity with the corporation that their dealings with it will be subjected to close scrutiny where the rights of its creditors are involved."

⁴⁸⁶ So in *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461, this court substantially said that directors are not mere figure-heads, but occupy a fiduciary relation toward the corporation, the stockholders and the creditors; they must exercise care, attention and circumspection in the management of its affairs, and particularly in the safekeeping and disbursement of the funds put into their custody and control, and they must see that they are appropriated as intended for the purposes of the trust. If they misappropriate

them or allow others to divert them from those purposes, they must account to their cestuis que trust for the dereliction of duty: *Shea v. Mabry*, 1 Lea (Tenn.), 319. But more to the point is a statement of the principle of liability involved in this case by Judge Thompson, which seems to be peculiarly applicable to the facts as they appear in the record: "It is not necessary to say that the corporation cannot sell or in any way alien its property to the prejudice of its creditors so as to hinder, delay or defraud them in the collection of debts owing by it; and in general, whenever a conveyance is made by a corporation under such circumstances as would characterize it as a fraud upon creditors, if made by an individual, it will be set aside in equity at the suit of such creditors, or other appropriate relief will be accorded them. Hence, a sale by a corporation to another corporation, in consideration of the latter delivering a specified amount of its stock to the individual shareholders of the selling corporation, and guaranteeing the payment of the debts of the selling corporation, is *prima facie* fraudulent as to the creditors of the selling corporation; and, where the rights of a creditor have supervened, it is beyond the power of the corporation, even with the consent of its shareholders, to sell out its plant and retire from business, taking the stock of the purchasing corporation in payment therefor and issuing ⁴⁸⁷ it to one of its individual shareholders, without any agreement on his part to pay the corporate debts": 10 Cyc. 1266, 1267.

It will be observed that the transaction is said by Judge Thompson to be void as being, in contemplation of law, fraudulent in respect to creditors; but, whether technically fraudulent or not, the fact is that assets, which should have gone to the payment of the corporate debts and liabilities, have been unlawfully withdrawn from that purpose and applied to the benefit of the shareholders, who are not entitled to receive them, leaving the debts of the corporation unpaid. Such a conveyance of the assets is practically, and to all intents and purposes, a voluntary one, as no consideration is actually paid to the corporation which can stand as a substitute to creditors for the assets so transferred and be as available and valuable to them as the original trust fund, the place of which it has taken. A transaction that produces this result will not defeat the trust which the law imposes upon the fund, nor impair the remedy of creditors if any

debts remain unpaid: *Vance v. McNabb Coal & C. Co.*, 92 Tenn. 47, 20 S. W. 424; *Chicago etc. R. R. Co. v. Howard*, 7 Wall. 392, 19 L. ed. 117; *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705; *Fellrath v. School Assn.*, 66 Ill. App. 77; *Chicago etc. Ry. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. Rep. 550, 33 L. ed. 900; *Central R. R. & B. Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. Rep. 387, 28 L. ed. 915; *Mellen v. Moline Iron Works*, 131 U. S. 352, 9 Sup. Ct. Rep. 781, 33 L. ed. 178.

As said by the court in *Hurd v. New York & C. Laundry Co.*, 167 N. Y. 89, 60 N. E. 327: "The stockholders consent (to the transfer), but the creditor objects. When he demands payment of his claim he is referred to the empty shell, which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation." When he seeks to hold the parties who have thus stripped the debtor corporation of practically all its available ⁴⁸⁸ capital, he is told that the stock of the insolvent defendant, the Young Hardware Company, now, of course, worthless, is his only resort. Can the law permit this, under the circumstances, to be any adequate response to the creditor's reasonable demand for the satisfaction of his claim? We are bound by every principle of equity and fair dealing and by the uniform precedents in such cases to answer this question emphatically in the negative. When there are debts outstanding, "it becomes the duty (of the directors) of the corporation to preserve its assets and administer them for the benefit of the creditors. A court of equity will then treat the assets as a trust fund. If they have been distributed among stockholders, or gone into the hands of others than bona fide creditors or purchasers (for value), a court of equity will follow them and compel them to be applied to the satisfaction of the debts": *Sidell v. Missouri Pac. R. R. Co.*, 78 Fed. 724, 24 C. C. A. 216. It was held in *Conse v. Columbia P. Mfg. Co. (N. J.)*, 33 Atl. 297, that a transfer by a corporation of all its property to another corporation, in consideration of the assumption by the latter of the former's debts, and the issuance of stock of the grantee to the grantor, which is carried out by the delivery of such stock to individual stockholders of the grantor, so that they could, if they saw fit, divide it among themselves instead

of applying it to the payment of debts, is *prima facie* fraudulent as to creditors of the grantor.

The elementary doctrine of equity is that it not only will view gifts and contracts between parties holding a confidential relation with a jealous eye, but it goes further, and forbids any person, standing in a fiduciary position, from making a profit in any way at the expense of the party whose interests he is bound to protect, or sacrificing the interests of the latter in order to advance or promote his own: ⁴⁸⁰ *Bispham's Equity*, 6th ed., pp. 343-347. The principles we have discussed have been stated with great clearness in *Womack on Private Corporations*, section 196, and in *Clark on Corporations*, 563. But our statute (Rev., sec. 1192) also forbids any division, withdrawal or reduction of the capital stock of a corporation except as therein provided, and charges the directors who violate its provisions with responsibility to the creditors in case of insolvency—that is, if it should become necessary for them to resort to such liability in order to collect the debts. It was so held, construing a similar statute, in *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365. The directors, Bynum, Clark and Terry, must therefore answer for the debts of their corporation to its creditors, they having wrongfully disposed of its assets, which were sufficient to pay the same; *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461; *Solomon v. Bates*, 118 N. C. 321, 24 S. E. 746. This case is not like *Perry v. Farmers' Mut. F. Ins. Assn.*, 139 N. C. 374, 111 Am. St. Rep. 791, 51 S. E. 1025, 2 L. R. A., N. S., 165, as the defendant there was a mutual insurance company, and the plaintiff could, by compelling calls and assessments, obtain satisfaction of his claim; but the court in that case denied the right of the corporators to dissolve the company for the purpose of preventing assessments, and thereby leave the creditors without a remedy by which to recover their claims.

The Young Hardware Company can hardly claim to be a bona fide purchaser, for value and without notice, of the goods it received and which belonged to the other corporation. The transfer to it was not for value paid to the latter corporation (if for value at all), and it had knowledge of the breach of trust on the part of the directors, because the transaction was not in the ordinary and usual course of business, but was, at least, rather exceptional in its nature, and the very circumstances of the case imply full notice to

it of all the facts necessary to charge it with liability: Bunting ⁴⁹⁰ v. Ricks, 22 N. C. 130, 32 Am. Dec. 699; Hulbert v. Douglas, 94 N. C. 122. It not only knew of the breach of trust by the directors, but actually assisted them in its consummation, itself receiving the fund which had been wrongfully diverted: Bunting v. Ricks, 22 N. C. 130, 32 Am. Dec. 699; Fellrath v. Scholl Assn., 66 Ill. App. 77.

We cannot attach any importance to the fact that the Young Hardware Company retained five shares of its stock (which in fact had not even been issued at the time) until the debts of the other company were paid. The officers of the Sanford Hardware Company should, of course, have known the amount of its indebtedness, and the Young Hardware Company should have made proper inquiry to ascertain what it was. The truth is that it bought the goods with its own stock, which was then worth only one-half of its par value, and consequently only one-half of the value of the goods it received, and which must have been the stock of a failing concern, as it is now worthless. The five shares thus retained, if they were intended to be a security for the debts of the Sanford Hardware Company, and were not merely withheld on condition that the debts should be first paid before a delivery of it to the officers or stockholders could be required, was at best but a very precarious indemnity to the creditors of that company. When the Young Hardware Company engaged in the transaction which threatened the rights of creditors of the other company, it took the risk of having to pay their claims in the event of the insolvency of the latter company, and it must abide the consequences of the hazard which has turned against it. The defendant company, therefore, is in no sense a bona fide purchaser for value, nor has it any right or equity superior to that of creditors of the company with whom it dealt.

It results, from what has been said, that as all of the ⁴⁹¹ defendants participated in the wrongful act by which the creditors of the Sanford Hardware Company have lost the benefit of the assets upon which they relied and to which they had the right to resort for the satisfaction of their claims, and which were adequate for that purpose, they are jointly and severally liable to the receiver who represents that corporation and its creditors (Craft v. Wilcox, 102 Ala. 378, 14 South. 653; Wood v. Sidney S. B. & F. Co., 92 Hun, 22, 37 N. Y. Supp. 885), for the amount necessary

to pay the claims existing against it, and interest, together with proper costs and expenses; but they will not be required to pay anything beyond that amount, whatever it is. As the Young Hardware Company is insolvent, if the plaintiff is required to share ratably with its other creditors, he will be permitted to prove his claim against it up to the full value of the goods (admitted to be \$2,000) and interest, provided, nevertheless, that he must not be allowed to recover from that corporation, as his pro rata share of its assets, more than will be sufficient to pay the amount due to creditors of the Sanford Hardware Company, with interest and all costs and expenses, as above stated: *Brown v. Merchants' & Farmers' Nat. Bank*, 79 N. C. 244. This is the proper equitable relief to be awarded, owing to the peculiar nature of the case. Under this scheme the directors, being also stockholders, are held liable only to the amount of the debts, as they would themselves be entitled to the surplus of the assets over what is necessary for the payment of the same. The other defendant, who received and converted the assets, is held liable to the full value thereof, nothing else appearing; but, as the stockholders have actually accepted its stock in satisfaction of their interests, it would be inequitable to charge this defendant with more than what is sufficient to pay the debts of the Sanford Hardware Company, the stockholders being virtually estopped by their conduct from claiming ⁴⁹² any more, even through the corporation or its receiver. Indeed, we do not understand that they make any such demand.

It does not appear what has become of the stock of goods transferred to the Young Hardware Company—whether it has been sold or otherwise disposed of by that company or whether that company still has possession of the stock; but we infer from the case agreed that it is not now available to the creditors of the other company, as its value is stated at \$2,000, and it is therefore understood that, if the plaintiff is entitled to recover at all, the value of the goods shall stand in the place of the goods themselves. If it has been sold, the defendant corporation is, of course, liable for its value to the extent necessary for the payment of the plaintiff's claim: *Wait on Fraudulent Conveyances*, 3d ed., secs. 177, 178; *Fullerton v. Viall*, 42 How. Pr. (N. Y.) 294; *Murtha v. Curley*, 90 N. Y. 372; *Valentine v. Ritchardt*, 126 N. Y. 272, 27 N. E. 255; *Williamson v. Williams*, 11 Lea (Tenn.),

855; Bump on Fraudulent Conveyances, 4th ed., sec. 628. We considered and decided a similar question in *Sprinkle v. Welborn*, 140 N. C. 163, 111 Am. St. Rep. 827, 52 S. E. 666, 3 L. R. A., N. S., 174. The defendant company cannot retain the property or its avails without paying the plaintiff's claim.

No actual fraudulent intent is imputed to the parties. It is agreed that they acted in good faith, but the law will not permit this fact to defeat the creditors of the Sanford Hardware Company, for it characterizes the transfer as wrongful and in violation of their rights, without regard to the specific intent. As to them it is void in law, even though not fraudulent in fact.

In reaching our conclusion, we have paid very little regard to the special provisions of the charter of the Sanford Hardware Company, which are set out in our statement of the case. They are not at all in conflict with the general principles ⁴⁹³ of equity which have controlled our decision. The authority of the directors to sell and dispose of the corporate property is conceded, but it should be exercised in a proper way; and that is what the legislature intended in giving the general power of disposition. The clause relating to the nonliability of a stockholder for the debt, default, or tort of any other stockholder does not forbid the application of just and equitable principles to this case; and, besides, we have held the stockholders liable as officers and, too, for a joint tort or misfeasance, and not for a separate tort committed by only one of them. But if the two provisions, or either of them, conflicted with the rule of equity we have applied and which has been embodied in our statute law (Rev., sec. 1192), they, or the one so conflicting, would be abrogated by the general clause of the Revisal, section 5458, which repeals all private statutes conflicting with it: *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820, 8 L. R. A., N. S., 498.

The judgment of the court will be set aside and a judgment entered for the plaintiff for the amount ascertained by a reference or otherwise to be due to him, under the principles herein stated, with further provision for his protection if he is required to share ratably with the creditors of the defendant company.

Error.

The Effect of the Transfer of One Corporation of all its assets is the subject of a note to Tabner v. Lindell Ry. Co., 103 Am. St. Rep. 548; and the effect of the consolidation of corporations is the subject of a note to Morrison v. American Snuff Co., 89 Am. St. Rep. 604.

CASE MANUFACTURING COMPANY v. MOORE.

[144 N. C. 527, 57 S. E. 213.]

COUNTERCLAIM, One Allowance upon Precludes All Further Recovery.—If the purchaser of property gives several promissory notes for the purchase price of merchandise, and, being sued upon one of such notes, pleads by way of counterclaim that the merchandise was defective and unsuitable, and in such action is allowed damages based on his counterclaim, he cannot, when sued upon one of the notes, set up substantially the same counterclaim. (pp. 983, 984.)

T. M. Hufham, Jones & Whisnant and W. H. Bower, for the plaintiff.

W. C. Newland and Lawrence Wakefield, for the defendants.

528 BROWN, J. The plaintiff sold certain machinery to defendants and contracted to properly install it in defendants' flourmill. Three notes were given for the unpaid purchase money. The machinery having been duly installed, the note first due was promptly paid. Defendants refused to pay the second note, and plaintiff brought suit on it. The defendants pleaded a counterclaim to the effect that the machinery was deficient, unsuitable, constructed and set up in an unskillful and unworkmanlike manner, and not according to contract, on account of which defendants demanded judgment for one thousand dollars damages. Upon such counterclaim defendants recovered three hundred and fifty dollars, which was set off against the note then sued on, and plaintiff awarded judgment for the balance of nine dollars and fourteen cents and costs of the action.

The plaintiff now sues to recover on the last of the three notes, and the defendants for answer plead a counterclaim on account of the inferior quality of the machinery and the unskillful and negligent manner in which it was installed. The court below held that the defendants were estopped to again set up substantially the same counterclaim in the present action, upon which they had recovered in the former, in

529 which ruling we fully concur. An examination of the answers in the two actions discloses that the counterclaim, or the ground for damage alleged by way of defense, is one and the same in both and based upon the same transaction. The matter is, therefore, *res adjudicata*, and the defendants cannot be permitted to recover twice upon the same cause of action. Upon the former trial, defendants had full opportunity to submit appropriate issues and evidence showing every damage resulting from the alleged breach of contract. If they did not avail themselves of their rights, they cannot now set up substantially the same cause of action. Generally, the plea of *res adjudicata* applies not only to matters actually adjudged, but to every other question which properly belonged to the subject matter of the issue, and which the litigants by reasonable diligence could have brought forward: *Tuttle v. Harrill*, 85 N. C. 456; *Piedmont Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144; *Dimock v. Revere Copper Co.*, 117 U. S. 559, 6 Sup. Ct. Rep. 885, 29 L. ed. 994; 1 *Herman on Estoppel*, secs. 122, 123. In *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108, it is said: "The cause of action embraced by the pleadings is determined by a judgment thereon, whether every point of such cause of action is actually decided by verdict and judgment or not. The determination of the action is a decision of all the points raised therein, those not submitted to actual issue being deemed abandoned by the losing party, who does not except."

Affirmed.

For Decisions Involving facts somewhat similar to those in the principal case, see Knorr v. Peerless Reaper Co., 23 Neb. 636, 8 Am. St. Rep. 140; *Pakas v. Hollingshead*, 184 N. Y. 211, 112 Am. St. Rep. 601. The determination in a former action of an issue presented on the part of the defendant therein by way of counterclaim is *res adjudicata* as fully as if determined in a separate action brought by the defendant against the plaintiff: *Lamb v. Wahlenmaier*, 144 Cal. 91, 103 Am. St. Rep. 66.

COOK v. PITTMAN.

[144 N. C. 530, 57 S. E. 219.]

CONVEYANCE—Acknowledgment, Certificate of Amended by Officer After the Expiration of His Term.—[1] of the peace taking the acknowledgment of a married woman conveyance attaches a certificate thereto which is insufficient, after the expiration of his official term, make out a new certificate, and if he does so, it does not entitle him to registration. (p. 986.)

S. J. Erwin and W. C. Newland, for the plaintiff.

Avery & Avery, for the defendant.

⁵³⁰ BROWN, J. In deraigning her title, the plaintiff offered a deed purporting to have been executed by Elisha Carroway and wife to Isaac Cook, July 20, 1878. This deed was offered as color of title. The following is the substance of the deed:

"I, Samuel W. Blalock, an acting justice of the peace for said county, do hereby certify that I have examined Elisha Carroway, Nancy Carroway, his wife, and Nancy, his wife, doth she signed the same freely and voluntarily, without compulsion of her said husband or any other person doth still assent thereto.

"Witness my hand, seal, this 26 July, 1878.

"S. W. BLALOCK, J.

The introduction of the deed was objected to for insufficiency of the certificate. During the recess of the court, ⁵³¹ Blalock attached to the deed a proper certificate and dated it July 26, 1878. He attached to the deed at the same time an affidavit dated April 11, 1906, that on July 26, 1878, he was a justice of the peace in Mitchell county and that Elisha Carroway and wife Nancy duly acknowledged said deed before him on that date, and that he took the privy examination of the wife. Upon this certificate the deed was registered during the recess, and when the trial was resumed it was offered again in evidence and admitted, over the defendant's objection.

We do not find anywhere in the record that the plaintiff insisted on proving on the trial the execution of the deed as a common-law deed for purposes of color.

fore, the right to introduce it at all must depend upon the sufficiency of the certificate of probate.

The first certificate is insufficient, because it does not appear thereon that Elisha Carroway ever acknowledged the execution of the deed, and therefore it does not come within the terms of the curative statute of 1893 (Rev., sec. 1017). Neither is the certificate sufficient as to Nancy Carroway, for the reason that it fails to state that the privy examination was taken separate and apart from her husband: *Fenner v. Jasper*, 18 N. C. 34; *Etheridge v. Ashbee*, 31 N. C. 353; *Hatcher v. Hatcher*, 127 N. C. 200, 37 S. E. 207.

We think that the second certificate, dated in 1878, but made in 1906, did not entitle the deed to registration, and was valueless, as Blalock was not in office and had not been for some years, and had actually, it is said, removed from the county. A sheriff or coroner who has gone out of office can make deeds for land sold by him under execution by virtue of the power conferred by the acts of 1784 and 1899, which gave the same power to successors: *Harris v. Irwin*, 29 N. C. 432. But we know of no statute, and ⁵³² none has been called to our attention, which authorizes a justice of the peace, whose term has expired, to attach a new certificate of probate to a deed. "One who has certified a married woman's acknowledgment cannot, after going out of office, correct a defect in the certificate": 1 Cyc. 607, where the authorities are cited; 1 Am. & Eng. Ency. of Law, 2d ed., 552; *Fitzgerald v. Milliken*, 83 Ky. 70; *Galbraith v. Gallivan*, 78 Mo. 452.

New trial.

A Certificate of Acknowledgment defective in form may be amended by the officer so as to make it conform to the facts: *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65; *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. St. Rep. 330; note to *Jordan v. Corey*, 52 Am. Dec. 520. Compare, however, *Griffith v. Ventresi*, 91 Ala. 366, 24 Am. St. Rep. 918.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

SECOND NATIONAL BANK v. PREWITT.

[117 Tenn. 1, 96 S. W. 334.]

BILLS AND NOTES—Indorsers, Right of to have the Holder Accept Payment Before Note is Due.—If an accommodation note is indorsed to a bank, and a collateral agreement is at the same time entered into between it and the maker that he may make payment before the note is due and have a rebate of interest, and the maker subsequently seeks to avail himself of such agreement, the holder must accept payment though he knows the maker to be then insolvent, for, failing to accept, he would release the indorsers. (p. 989.)

BILLS AND NOTES, Payment Before Bankruptcy, When does not Release Indorsers.—If the maker of a note tenders payment to the holder, who then knows the insolvency of the maker, but is under a contract to receive such payment, his duty as against indorsers is to accept payment, but, upon the maker's being declared a bankrupt, the duty of the payee is to surrender his preference and present his claim against the estate of the bankrupt, and on so doing, he is entitled to proceed against the indorsers who remain liable notwithstanding such payment. (p. 993.)

BILLS AND NOTES, Indorsers, Extent of Release of by Failure of a Payee to Present His Claim Against a Bankrupt Maker.—If the maker of a note becomes insolvent and is adjudged a bankrupt, the payee should present his claim for allowance in the bankrupt's estate, and, failing to do so, the indorsers are released, but only to the extent to which they suffer because of such failure, and a recovery may be had against them for the amount which would have remained unpaid had the claim been presented in bankruptcy and a dividend been allowed and received thereon. (p. 993.)

W. H. Biggs, for the complainant.

C. G. Bond, for the defendants.

* NEIL, J. On the 19th of January, 1900, Prewitt & Co. executed to the order of J. T. Rushing, R. E. Prewitt and
(987)

J. T. Jones a note in the sum of \$2,500, maturing twelve months after date. This note was indorsed by the payees waiving demand and notice, to the Second National Bank. The indorsers had no beneficial interest in the transaction, the note having been made merely for the accommodation of Prewitt & Co. When the note was negotiated to the bank, there was a collateral contract entered into between it and Prewitt & Co. to the effect that the latter should have the right to pay the debt before due, and to have a rebate of interest from the time between the date of payment and maturity.

On the 18th of September, 1900, Prewitt & Co., through their representative, J. J. Prewitt, claimed of the bank the right to pay off the note, and were permitted to do so; a rebate of \$68 being allowed for the difference of time.

Within a few days after this payment, the creditors of Prewitt & Co. filed a petition in bankruptcy against them, and they were duly adjudged bankrupt. An action was brought by Harris, the trustee in bankruptcy, against the bank, and he recovered in this action the full amount which had been paid to the bank. The aggregate was \$3,100, and interest. This included not only the payment on the \$2,500 note, but likewise payment of an overdraft of about \$600; and part payment of a note of \$795, indorsed by J. T. Rushing.

⁴ The controversy in the Harris case is reported under the name of *Harris v. Second Nat. Bank*, 110 Tenn. 239, 75 S. W. 1053.

The amount recovered from the bank was paid into the bankruptcy court, and was there prorated among the other creditors of Prewitt & Co., the bank not having filed any claim.

After the bank had paid the judgment, it brought the present suit against R. E. Prewitt and J. T. Rushing, indorsers on the \$2,500 note, to recover two-thirds thereof, the other indorser, J. T. Jones, having already paid one-third without suit.

The defendants insist that they are not liable and refer for authority to *Harris v. Second Nat. Bank*, 110 Tenn. 239, 75 S. W. 1053. In that case the court did not have before it the question here presented, and what was said upon the liability of indorsers appeared only in a quotation from *Bartholow v. Bean*, 18 Wall. (U. S.) 635, 21 L. ed. 866. There is nothing in the opinion in *Harris v. Second Nat. Bank*, 110

Tenn. 239, 75 S. W. 1053, that in any way bears upon the present controversy, except the observation that the bank was not compelled to accept payment of the amount of the note on penalty of releasing the indorsers. In the present case, it appears there was a collateral agreement between the bank and the makers to the effect that the makers would have the right to pay the note before maturity and obtain a rebate. This agreement was in the nature of a security or counter-security for the benefit of the indorsers, and if the bank ⁵ had refused to accept the money thereon, the indorsers could afterward have claimed a release.

The bank was, then, in this position. A valid payment was offered to it, which it dared not refuse on penalty of losing its indorsers. It is said, however, that Prewitt & Co. were insolvent, and the bank knew such to be the fact. This is true, but there might never be any proceeding in bankruptcy instituted against them.* In that event, the payment would continue good. The indorsers were entitled to this benefit, and if the bank had refused when offered, they would have just ground of complaint. What was said in *Bartholow v. Bean*, 18 Wall. (U. S.) 635, 21 L. ed. 866, as to the nonliability of the indorser was mere dictum. The case did not call for it. The action there was by the assignee in bankruptcy against a creditor who had received a preference to recover the amount so paid. No question of the liability of an indorser was involved: See, on the general subject, *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 54 C. C. A. 387, and cases cited; *Watson v. Poague*, 42 Iowa, 582; *Pritchard v. Hitchcock*, 6 Man. & G. 151; *Petty v. Cooke*, L. R. 6 Q. B. 790.

The facts in *Watson v. Poague*, 42 Iowa, 582, were these: Watson held a promissory note for \$500 executed jointly by Poague, and Wood and one John W. Griffith. After the note became due, Griffith made a payment of \$409.95 on it, and within four months thereafter was adjudged a bankrupt on the petition of creditors other than Watson. After the adjudication in bankruptcy, Poague and ⁶ Wood paid to Watson's clerk, who was ignorant of the circumstances, the residue of the note, and took it up. The assignee in bankruptcy recovered of Watson the amount which had been paid him by Griffith. Watson thereupon brought his suit in equity against Poague and Wood, praying that they be ordered to deliver up the note, that the entry of credit thereon of \$409.64 paid by Griffith be declared void, and that the plain-

tiff, Watson, have judgment against the defendants Poague and Wood for that sum, with interest and costs. In affirming a judgment in favor of Watson for the amount claimed, the court said that the true ground of relief was, not that the entry of credit was made by mistake, but that Watson had lost the benefit of the payment for which the entry of credit was made on account of the subsequent proceedings in bankruptcy, "an event which, at the time of payment, was wholly contingent, and, therefore, beyond the knowledge of any human being"; that it was immaterial whether he did or did not know the provisions of the bankrupt act, or whether he did or did not know that Griffith was insolvent; that it was proper for him to receive the payment, but if he received it knowing that Griffith was insolvent, he received it subject to the rightful claim of an assignee in bankruptcy, if an adjudication in bankruptcy should take place upon petition filed within four months thereafter.

"It is true," continued the court, "that the receiving of the payment under such circumstances is called, in the bankrupt act, accepting a fraudulent preference, but ⁷ it was not an actual fraud, nor would it have been even a constructive fraud, if an adjudication in bankruptcy had not taken place upon a petition filed within four months. Besides, whatever was done was not done with intent to wrong the defendants, but rather to protect them. If plaintiff had declined to receive the payment, especially if Griffith was insolvent, the defendants might justly have complained. There was at least a possibility that no adjudication in bankruptcy would take place upon a petition filed within four months. But it did take place, and now the plaintiff asks relief, not against his own fraud, but because the payment which he properly received has been held, by reason of what afterward transpired, and under the peculiar provisions of the bankrupt law, to have been made to him in trust, for all of the creditors of Griffith."

In *Pritchard v. Hitchcock*, 6 Man. & G. 151, it appeared that the plaintiff had lent to William Hitchcock a large sum of money, the payment of which was guaranteed by George Hitchcock. Subsequently William paid the debt, but was at that time "in a state of complete insolvency." Within a few days thereafter a "fiat in bankruptcy" issued against William, the assignees under which brought an action against Pritchard to recover the money so paid by the bankrupt,

upon the ground that the payment was a fraudulent preference, in which action they succeeded. Thereupon Pritchard brought his action against the guarantor, George Hitchcock. It was held that the payment did not amount to a satisfaction.

⁸ In *Petty v. Cooke*, L. R. 6 Q. B. 790, the facts were that Cooke for the accommodation of Steele executed with him a promissory note for £100, payable to Petty. Steele paid it in contemplation of insolvency, and Petty innocently accepted the amount. Afterward Steele's trustee in bankruptcy recovered of Petty the amount which the latter had received from Steele. Petty then brought an action against Cooke, the accommodation maker, and he pleaded that the acceptance by the plaintiff of the payment which had been made by Steele discharged him, Cooke, from liability as a comaker or surety. The court of queen's bench held otherwise.

Blackburn, J., said: "Is there any case which says that an innocent act, unconsciously done, discharges the surety? The creditor accepts the money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety. He therefore did no act injurious to the surety, and the surety is not discharged." Lush, J., said: "I am of the same opinion. The rule of law and equity with regard to the rights of a surety is the same. I do not entertain the slightest doubt that the act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done, and which interferes with the rights of a surety; an acceptance of money from the debtor, which the creditor thought at the time he accepted it was a good and valid payment, cannot, therefore, discharge the surety. The creditor, under the present circumstances, could not have refused to accept the ⁹ money; its acceptance was an advantage, not an injury, to the surety." Hanner, J., said: "I am also of the same opinion. Lord Eldon puts it that the surety is discharged when the creditor has done anything which is 'against the faith of his contract.' How can it be against the faith of his contract for the creditor to do that which it was his duty to do, namely, to receive payment? It turned out afterward that the payment was not a good payment, and therefore the surety is not discharged."

Judge Sanborn, after citing the foregoing opinion, said in *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 54 C. C. A. 387, a case presenting a similar question: "Those opinions are well

grounded in reason, clear and persuasive. They lead to just and equitable results, and they are exactly applicable to the facts of this case. The bank was guilty of no fraud or wrong when it accepted payment from the insolvent. The indorsers, as well as the bank, knew that any payments made upon the notes by the principal debtor were liable to be recalled as a condition of the allowance of the claim of the bank against its estate, if the maker of the note was adjudged a bankrupt upon a petition filed within four months of the payments. Their contract was conditioned by this fact, and by the statute which called it into being. The acceptance of such payments was not forbidden by the moral or by the civil law. The bank did not know, and could not foresee, that the principal debtor on the note would become a bankrupt within four months from the payments. The holder of a surety's obligation ¹⁰ may discharge it if he knowingly does any part to diminish his security or his opportunity to enforce it, or any act to increase his liability. But the acceptance of these payments did none of these things. A refusal to accept them might well have been held to be an act so likely to entail unnecessary loss upon the accommodation makers that it would discharge them. But the receipt of the money was an act of reasonable diligence—an act in the rational discharge of the duty of the bank toward the sureties. It hoped and believed that the money it received would be a payment upon the debt. If it returns it, no payment has been made by the receipt of it. The debt remains unpaid, because the money received turns out to be the property of the bankrupt estate, which the bank holds in trust for, and returns to, the estate under the law. The sureties are not discharged by the payment and satisfaction of any part of the notes, because no payment and satisfaction were effected. They are not discharged by any act or negligence of the creditor, because it has been guilty of none which either increased their liability or diminished their security or their opportunity to enforce it. The only just and equitable conclusion is that the accommodation makers, indorsers, or sureties upon the obligation of an insolvent debtor are not discharged from liability to pay them by the innocent acceptance by their creditor, of payments thereon from the insolvent debtor which the creditor is subsequently required to and does surrender to the latter's trustee in bankruptcy as a condition of the allowance ¹¹ of its

claim under section 57g of the bankrupt act": Act July 1, 1898, c. 541; 30 Stats. 560; U. S. Comp. Stats. 1901, p. 3443.

The duty of the present complaint was, upon the adjudication in bankruptcy of Prewitt & Co., to surrender the preference and file its claim for allowance: 5 Cyc. 330, 331. It was compelled to restore the money, but failed to file its claim against the estate. The extent of the injury suffered by the indorsers through this failure is measured by the amount that would have been realized by the bank if it had filed the claim, and which was lost by not filing it. For this injury the bank must account in the abatement of its demand.

The record shows, without controversy, the amount of the debts filed in this proceeding, the assets, and the pro rata paid. To the debts should be added the \$2,500 note, and the pro rata figured on that basis as of the date of the pro rata which was made in the bankruptcy proceeding. The pro rata amount thus ascertained for the \$2,500 note will show the sum the bank would have received had it filed its claim. The amount so found must be deducted from the note.

It is conceded that on the basis above fixed, the pro rata amount applicable to the \$2,500 note would have been \$837. Deduct this amount, also the sum paid by Jones, the third indorser, and enter judgment for the bank for the balance and interest, against defendants Prewitt and Rushing.

It is insisted that the settlement should be made on ¹² the basis of the bank's filing the whole of its demand against Prewitt & Co., that is the overdraft and the amount which had been received on the Rushing note. We cannot deal with that phase of the matter in the present case. The bank had no duty resting on it to any third party in respect of the overdraft. Nor can we deal with the \$795 note; that matter is not before us. We have referred to it in a preceding part of the opinion, merely in an incidental way, in stating the history of the transaction.

Judgment as above directed.

The Doctrine of the Principal Case as stated in the second and third headnotes has the support of *Wright v. Ganesvoort Bank*, 118 App. Div. 281, 103 N. Y. Supp. 548; *Perry v. Van Norden Trust Co.*, 118 App. Div. 288, 103 N. Y. Supp. 288; *Harner v. Batdorf*, 35 Ohio St. 113.

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L. LEONHARDT & CO. v. W. H. SMALL & CO.

[117 Tenn. 153, 96 S. W. 1051.]

BILLS AND NOTES.—The Payee of a Bill of Exchange After Its Acceptance occupies to the acceptor the position of a bona fide purchaser, and therefore, between the payee and acceptor, no want, failure or other defect of consideration existing between the debtor and the acceptor can be shown, and this remains true though the drawee has been induced to accept the bill by means of a fraud, such as attaching thereto a forged or fraudulently altered security or bill of lading. (pp. 996, 997.)

BANK, Liability of as Purchaser of a Bill or Draft Attached to a Bill of Lading.—The purchaser of a draft with a bill of lading attached is not a purchaser of the goods represented by such bill, so that the presentation of the draft for payment becomes a contract on the part of the purchaser to sell the goods to the drawee, when, as a matter of fact, the goods had already been sold by the drawer to the drawee, and as a matter of law, the bill of lading and the goods only passed as collateral security for the draft, which was the only thing the bank bought. (p. 1000.)

NATIONAL BANKS, Contracts of, When Ultra Vires.—If the sale of a draft is in effect a sale outright of the bill of lading attached thereto so as to amount to a sale of the goods represented by such bill, and the purchaser is a national bank, then the entire transaction is ultra vires, and no obligation arising therefrom can be enforced against the bank. (p. 1000.)

CORPORATIONS—Ultra Vires Contracts.—No action can be maintained by either party on an ultra vires contract—not even by a party who has fully executed the contract on his part. (p. 1001.)

BANKS.—The Purchase by a Bank of a Draft with a bill of lading attached representing goods shipped does not so vest the property in such goods in the purchasing bank that it becomes substituted to all the liabilities of the original drawer and the absolute owner of the property. It merely holds the bill as collateral security for the draft and is not a guarantor of the quantity or quality of the goods shipped under the bill of lading. (p. 1001.)

BANKS, Effect of Indorsing Special Notice on Some Bills of Lading and Omitting It as to Others.—Where several drafts are drawn and there are attached thereto several bills of lading representing goods shipped, and on some of the drafts is a stamped statement that the bank notifies all concerned that it is not responsible either as principal or as agent for the quantity, quality or delivery of the goods covered by the bills of lading, this does not show that a different rule must be applied where the statement is omitted from that where it is used. The indorsement by such stamping is surplusage. (p. 1002.)

John W. Green, for the complainants.

Shields, Cates & Mountcastle, for the defendants.

155 WILKES, J. The complainants, Lewis Leonhardt & Co., brought this suit against W. H. Small & Co., of Evans-

ville, Indiana, the Fourth National Bank, of Cincinnati, Ohio, and the Mechanics' National Bank, of Knoxville, Tennessee, to recover the sum of three hundred dollars damages for the breach of a contract which complainants made with W. H. Small & Co. to purchase from them ten carloads of No. 1 timothy hay. The facts reported by the court of chancery appeals are as follows:

The complainants, Lewis Leonhardt & Co., who reside in Knoxville, Tennessee, contracted to buy from W. H. Small & Co., who reside at Evansville, Indiana, ten carloads of No. 1 timothy hay at fifteen dollars per ton f. o. b. cars at Knoxville. W. H. Small & Co. shipped ten carloads of timothy hay to Knoxville on bills of lading issued to their own order. They drew sight drafts on Lewis Leonhardt & Co., payable to themselves, and attached one of said bills of lading to each of said drafts. They sold all of said drafts to the Citizens' National Bank, of Evansville, Indiana, for full value, and in the due course of trade, and these drafts were sold in turn by said bank to the Fourth National Bank, of Cincinnati, Ohio, and by it to the Mechanics' National Bank, of Knoxville, Tennessee, for full value and in the due course of trade. The Mechanics' National Bank presented the drafts to Lewis Leonhardt & Co. for acceptance ¹⁵⁶ and payment, and they accepted and paid them all, and the drafts were delivered to them.

When Lewis Leonhardt & Co. unloaded the hay they discovered that it was not No. 1 timothy hay, and that it was worth three hundred dollars less than the hay they had contracted to buy. Thereupon they brought this suit and attached the money that they had paid to the Mechanics' National Bank on the drafts. They charged that the money belonged to W. H. Small & Co., and the Fourth National Bank, of Cincinnati, the Mechanics' National Bank, of Knoxville, and W. H. Small & Co., were all liable to them for the breach of the contract by W. H. Small & Co. to ship them No. 1 timothy hay, and they prayed for a decree against all of the defendants for said sum of three hundred dollars. The court of chancery appeals finds as a fact that the money attached did not belong to W. H. Small & Co., but that it belonged to Mechanics' National Bank when it was attached. Small & Co. never entered their appearance to this suit, and are not before the court. The complainants do not ask for a decree against them.

The chancery court and the court of chancery appeals have both rendered decrees against the Fourth National Bank, of Cincinnati, and the Mechanics' National Bank, of Knoxville, for three hundred dollars damages and costs, and the cause is now before this court upon defendants' appeal and assignments of error to the decree of the court of chancery appeals.

The theory of complainants, which was adopted by the ¹⁵⁷ lower courts, is that when the defendant banks purchased said drafts they became the owners of the hay, and responsible for the performance of Small & Co.'s contract for its sale as to quality, quantity and delivery, and are liable for damages to the purchaser for Small & Co.'s breach of the contract in any of said respects, although the drafts were negotiable, and said banks are innocent purchasers thereof, and on presentation to the drawees, Lewis Leonhardt & Co., they unconditionally accepted and paid drafts.

Complainants' contention is supported by the cases of *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48, *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, and *Haas & Co. v. Citizens' Nat. Bank*, 144 Ala. 562, 113 Am. St. Rep. 61, 39 South. 129, 1 L. R. A., N. S., 242; *Searles v. Smith Grain Co.*, 80 Miss. 688, 32 South. 287.

The case of *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, did not meet the approval of the annotators of that valuable set of reports, and many cases are cited to show that the rule laid down in the case is unsound and out of line with the great weight of authority, and he concludes his notes and criticism as follows: "From these cases, all of which hold that after a draft attached to a bill of lading is accepted the consignee becomes absolutely liable on the acceptance, and that after payment thereon is made he cannot recover it back, notwithstanding any failure of consideration between him ¹⁵⁸ and the drawer, it would seem that the decision in the main case, and in *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48, were based on a wrong principle, and that, if the right principle had been considered, the decisions must have been different."

The American and English Encyclopedia of Law, citing many cases in support thereof, lays down the true rule in these words:

"The payee of a bill of exchange occupies in relation to the acceptor the position of a bona fide holder, and, therefore, between the payee and acceptor, no want, failure, or

other defect of consideration existing between the drawer and the acceptor, can be shown.

"And this is true although the drawee has been induced to accept the bill by means of a fraud, such as attaching thereto a forged or fraudulently altered security or bill of lading": See 4 Am. & Eng. Ency. of Law, 2d ed., 198, 199, and authorities there cited.

In the case of *Hoffman v. National City Bank of Milwaukee*, 12 Wall. (U. S.) 181, 20 L. ed. 366, the supreme court of the United States, speaking upon this subject, said:

"Where bills of exchange were drawn, accompanied with forged bills of lading, and were discounted by a bank, and subsequently accepted and paid by the acceptors, they cannot recover back from the bank the money paid by them, on the ground of the forgery of ¹⁵⁰ the bills of lading, of which the bank was ignorant at the time of their discount.

"Proof that the bills of lading were forgeries could not operate to discharge the liability of the acceptors to pay the amounts to the payees or their indorsees, where the payees were ignorant holders, having paid value for the same in the usual course of business.

"It is immaterial, in that regard, whether the bills were accepted while in the hands of the drawer and at his request, or whether they had passed into the hands of the payee before acceptance, and were accepted at his request."

In the case of *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. Rep. 318, 30 L. ed. 515, a bank discounted several drafts with bills of lading attached. The consignee, after accepting and paying several of the drafts, discovered that the bills of lading were forged, whereupon he refused to pay one draft which he had accepted, and sued to recover the amount of the drafts which he had paid. The court held that the bank did not, by discounting the drafts or by indorsing the invoices accompanying the bills of lading "for collection," guarantee the genuineness of the bills of lading, and that its right to recover on the acceptances was not defeated by the mere failure to inquire into the consideration of the drafts because of rumors or general reputation as to the bad character of the drawer. Speaking directly upon the question involved in the case at bar, the supreme court of the United States said:

¹⁵⁰ "A bank in discounting commercial paper does not guarantee the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn

as in the present case are merely security for the payment of the drafts. The indorsement by the bank on the invoices accompanying some of the bills 'for collection' created no responsibility on the part of the bank; it implied no guaranty that the bills of lading were genuine; it imported nothing more than that the goods, which the bills of lading stated had been shipped, were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid, the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper against which they are drawn": 119 U. S. 555, 7 Sup. Ct. Rep. 318, 30 L. ed. 515.

The latest case upon the subject is that of Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777. This case repudiates the doctrine laid down in the cases of Landa v. Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48, and Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, relied upon by the complainants in the case at bar, and reaffirms the long-established doctrine insisted upon by defendants. The facts in the Iowa case are almost identical with the facts in the case at bar, and in discussing the Texas and North Carolina cases, the supreme court of Iowa said:

161 "These decisions proceed upon the theory that the assignee stands in all respects in the shoes of the assignor, and to this broad doctrine we cannot agree. While the rights of such an assignee are to be measured by those of the assignor, his liability is not necessarily the same. . . .

"The rule of the Landa case (19 Tex. Civ. App. 246, 46 S. W. 481) is founded on the thought that the transfer of the draft and bill of lading to the bank amounted to a sale of the goods, and that the bank as a purchaser undertook to deliver the goods and carry out the canneries company's contract with plaintiff, and because of these facts it necessarily assumed the contract of warranty, although it may have been in fact ignorant that any warranty was made. We do not think, even as the proposition is thus stated, the premises justify the conclusion; but the premises are not correct. The transaction between the canneries company and defendant was not, and could not be, a sale of the goods, for they had already been sold to plaintiff, and it was the intention of all parties

that such sale to plaintiff should be consummated by delivery. What was in fact done by the assignment of the draft and bill of lading was to transfer to the bank the canneries company's right to the price, and to give it the possession of the goods as security. Manifestly, while the bank could collect no more than its assignor would have been entitled to, the character of its engagement was not such as to impose upon it any liability to the buyer which it did not expressly assume. . . .

¹⁰² "The two cases cited stand alone in holding the purchaser of a draft with bill of lading attached liable on a warranty made by the assignor, and the line of reasoning pursued to reach this conclusion is so at variance with well-established principles of law that we decline to accept the rule they announce.

"If there is any liability on defendant's part to plaintiff, it must be on the ground that it has received money which it cannot equitably retain. The canneries company could have collected only the price of the goods, less the damages for breach of warranty. More than this has been paid to defendant. If plaintiff has any standing here, it is to recover this excess paid, on the theory just stated. But the draft given the bank was negotiable, and it is a well-established rule of law that, after the holder of a negotiable draft with bill of lading attached has secured an acceptance of such draft from the drawee and consignee he is unaffected by any equities originally existing between such consignee and the seller of the goods. In such a case the liability of the drawee becomes fixed to the payee: *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25; *Flournoy v. First Nat. Bank*, 78 Ga. 222, 2 S. E. 547; *Nowak v. Excelsior Stone Co.*, 78 Ill. 307; *Law v. Brinker*, 6 Colo. 555; *Hays v. Hathorn*, 74 N. Y. 486; *Shafer v. Bronenberg*, 42 Ind. 89; *Randolph on Commercial Paper*, 1876.

"It is said in the first of these cases: 'The payee of an accepted bill holds the same relation to the acceptor that an indorsee of a note holds to the maker.' Under ¹⁰³ this rule, the plaintiff, after an acceptance of the draft, could not have set up against the bank any claim for breach of warranty made by the canneries company, and if this is the effect of an acceptance, it certainly is of a payment.

"There was no matter of mutual mistake in this transaction between plaintiff and defendant. The latter had a right, as against the canneries company, to collect the full amount

due on the draft from the drawee. The mistake, if any, was as to a matter between plaintiff and the drawer of the draft": *Tolerton v. Anglo-California Bank*, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 779.

In the cases relied upon by the complainants and followed by the court of chancery appeals, the courts of the states of Texas, North Carolina, and Alabama failed to recognize and apply the well-settled principles of commercial law laid down in the foregoing authorities. They erroneously assumed that the purchase of a draft with a bill of lading attached was a purchase of the goods represented by the bill of lading, and that a presentation of the draft for payment was a contract by the bank to sell the goods to the drawee. when, as a matter of fact, the goods had already been sold by the drawer to the drawee, and, as a matter of law, the bill of lading and goods only passed as collateral security for the draft, which was the only thing the bank bought.

Furthermore, the rule laid down by the supreme court of the United States in the case of *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. Rep. 318, 30 L. ed. 515, is necessarily the law in the case ¹⁶⁴ at bar, for another reason than that given in the foregoing authorities. If the sale of the drafts was in fact a sale outright of the bills of lading and in legal effect a sale of the hay to the defendant Banks, as held in the case of *Landa v. Lattin*, 19 Tex. 246. 46 S. W. 48, and in *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, then the entire transaction was ultra vires, and no obligation arising therefrom could be enforced against the banks. National banks may take personal property as security for loans, or as security for bills of exchange purchased by them, but national banks have no power whatever to deal in merchandise of any kind, or in stocks or bonds: U. S. Rev. Stats., sec. 5136 (U. S. Comp. Stats. 1901, p. 3455); *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. Rep. 831, 42 L. ed. 198; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. Rep. 739, 43 L. ed. 1007.

The complainants are insisting that the banks by purchasing the drafts with the bills of lading attached agreed in turn to sell to the complainants ten carloads of No. 1 timothy hay, and that each of the banks have in turn breached the contract of sale by delivering an inferior grade of hay, and complainants are seeking to recover damages for the breach of the contracts. Hence this suit is obviously for

the enforcement of the ultra vires contracts alleged to have been made by the banks.

It was expressly held in the federal cases above cited, and has been held by this court in the case of Buckeye Marble & F. Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 188 252, 36 Am. St. Rep. 71, that no suit can be maintained by either party in the furtherance or affirmance of an ultra vires contract—not even by a party who has fully executed the contract on his part. “Such illegal contracts,” say the courts, “create no estoppel upon either party.”

It is a fact of common knowledge that a large part of the commercial business of the country is carried on through the medium of drafts, and that the immense crops of the south and west are marketed under contracts to draw for the purchase price with bills of lading attached. If the courts shall adopt the rule insisted upon by the complainants, and enforced by the decree of the court of chancery appeals, it will result in destroying this convenient method of handling, moving, and paying for the crops of the country, for the banks will necessarily be compelled to refuse to buy drafts with bills of lading attached, or to handle them as collateral security or otherwise. Banks have neither the time nor the facilities to investigate the genuineness of bills of lading, or the contracts made between their customers with parties residing in other states, and to hold them responsible for the frauds and mistakes of shippers would utterly destroy the negotiability of drafts with bills of lading attached.

The case of Haas v. Citizens' Nat. Bank, 144 Ala. 562, 113 Am. St. Rep. 61, 39 South. 129, 1 L. R. A., N. S., 242, has also been adversely commented on by the annotators of the L. R. A. reports, in an exhaustive note, citing many authorities.

¹⁸⁸ With all due deference to the ability and standing of the courts of Alabama, Texas, and North Carolina, which have been cited and relied upon, we are of opinion that the rule which they announce is unsound and contrary to the otherwise unbroken weight of authority.

They proceed upon the incorrect theory that the bill of lading so vests the property in the indorsing banks that they are substituted to all the liabilities of the original drawer, and are the absolute owners of the property, while the true rule is that the indorsing banks hold the bills of lading sim-

ply as collateral to secure the drafts drawn against them, but they are not the guarantors of the quantity or quality of the goods shipped under the bill of lading. That is a matter between the drawer and drawee.

There is nothing in this holding contrary to the case of *Ochs v. Price*, 6 Heisk. (Tenn.) 483, nor *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92, 23 L. ed. 208.

It is insisted for complainants that all but three of the drafts were stamped by the Evansville bank, which first cashed them and took the bills of lading, with this indorsement: "This bank hereby notifies all concerned that it is not responsible, either as principal or agent, for the quantity, quality or delivery of the goods covered by the bills of lading attached to this draft. [Signed] Citizens' National Bank." And the argument is made that, because three of the drafts were not thus indorsed, it was the intention of the parties that, as to these three ¹⁰⁷ drafts, a different rule should apply; and that the holders or purchasers of these drafts would be guarantors of quality, quantity, and delivery; and that, inferentially at least, the bank omitting to thus indorse the three drafts impliedly said: "We will be responsible for defects in the hay covered by these three drafts, but not that covered by the other drafts." We think that this contention is not sound.

The indorsement was surplusage, and under it the bank was in no better condition than if it had not been made.

We cannot infer that the bank intended to render itself liable for the three drafts by failing to stamp the restrictive indorsement on them. For all we can know, they were overlooked. But however that may be, they were put in circulation without any agreement or contract that a purchaser would be liable for the goods, and we must give them the same status as any other draft of like character.

We are of opinion that there are errors in the decrees of the chancellor and of the court of chancery appeals, and they are reversed, at complainants' cost.

Proper decree will be entered disposing of the fund attached, if still held.

The Assignment of Bills of Lading is the subject of a note to *National Bank v. Baltimore etc. R. R.*, 105 Am. St. Rep. 332. It has been affirmed that an absolute assignment to a bank of a bill of lading of goods, and of the draft for their purchase price, makes the bank the owner of the goods, and liable to deliver them according to the terms of the original contract: *Haas v. Citizens' Bank*, 144 Ala. 562, 113 Am. St. Rep. 61.

INGERSOLL v. COAL CREEK COAL COMPANY.

[117 Tenn. 263, 98 S. W. 178.]

ATTORNEYS AT LAW, Liability of to Persons Participating in a Compromise of a Suit.—If a corporation and sundry individuals are joined as defendants in a suit to recover by plaintiffs as attorneys at law on the ground that the defendants, having knowledge of the plaintiffs' employment, participated in a compromise and settlement of claims against such corporation without the consent of the plaintiffs, if the corporation is held liable, then must such other defendants be individually and personally liable with it. (p. 1027.)

CONTRACTS, Void, Right of Strangers to Insist upon Void Character of.—If contracts are for some reason void, then that they are so void may be insisted upon by persons not parties thereto, where a liability against them is sought to be asserted having its foundation on such contracts. (p. 1027.)

ATTORNEYS AT LAW, Right to Defend Action on the Ground of Their Misconduct in Procuring Employment.—Where a corporation and other defendants are sued by a firm of attorneys on the ground that the defendants procured a compromise and settlement of claims in suits in which the plaintiffs had an interest in the way of contingent fees, the defense may be made that the plaintiffs, in soliciting and procuring their employment to bring such suits, were guilty of such professional impropriety that the court will not entertain their action. (p. 1028.)

A CONTRACT, Though not Illegal, may be Accompanied with Circumstances surrounding its making which would deter courts from enforcing it or rights based upon it. (p. 1028.)

ATTORNEYS AT LAW, General Power of Courts to Disbar.—Attorneys at law being officers of the court, it has inherent power to keep its forum pure by removing therefrom all parties appearing therein whose practices and acts tend to make them impure or to impede, obstruct, or prevent the administration of the law, or destroy the confidence of the people in such administration. (p. 1028.)

THE DISTINCTION Between Attorneys and Counsel which obtained in the English common law does not prevail in Tennessee. (p. 1030.)

ATTORNEYS AT LAW, Denying Relief to for Causes Which do not Require Disbarment.—There may be many acts of immorality or impropriety on the part of an attorney or counsel which would not require the court to deny him relief for fees which might not be considered sufficient to require disbarment. (p. 1031.)

ATTORNEYS AT LAW, Solicitation of Business Which is Against Public Policy and may Occasion the Denial of the Right to Recover Compensation.—If after a terrible disaster in a mine, resulting in the killing of hundreds of persons, a member or representative of a firm of attorneys proceeds to the locality of the disaster and personally solicits parties having supposed rights of action against the mine owners to put their claims in the hands of such attorneys, and other attorneys enter the same field for the same purpose, and competition results in obtaining the business of prosecuting claims for judgment, and many cases are secured for the firm first entering the field for the prosecution of cases on a contingent fee or percentage, the

attorneys so seeking such contracts are not entitled to recover for their services therein, because the facts disclose acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties. (pp. 1032, 1034.)

Ingersoll & Peyton, for Ingersoll et al.

H. B. Lindsay, Charles T. Cates, Jr., and R. E. L. Mountcastle, for the defendants.

²⁶⁵ WILKES, J. The facts found by the court of chancery appeals are set out in its opinion as follows:

“The dominant facts appearing in the record, proper to be stated, raising the question or proposition involved in this assignment of error, are these:

“Messrs. Ingersoll & Peyton are a law firm resident of and having offices at Knoxville, Tennessee. They are practitioners in the courts of this state. Complainant Chandler is a much younger member of the Knoxville bar.

“Some seven years ago he entered into a contract with the firm of Ingersoll & Peyton, under the terms of which he was to have one-third of the fees accruing from the business he brought to the firm, he assisting in looking up the evidence and preparing such cases for trial as he obtained, or as came to the firm through him.

“In brief, we take it from the evidence, while not a full partner in the firm, he was a partner in it with reference to such business as he procured for it.

“We infer from the record that he had his office quarters with the firm.

²⁶⁶ “We see nothing immoral, unprofessional or obnoxious to public policy or a correct standard of professional ethics in such a partnership relation. Such a relationship in the practice of law has existed from time immemorial in the profession in this state between lawyers of the highest honor and the keenest sense of the dignity of the profession.

“In short, there is nothing wrong per se in such an arrangement between honorable members of the profession.

“The methods that may be adopted or resorted to to procure legal business present another question.

“Now, when the Fraterville mine explosion occurred in 1902, young Chandler a few days thereafter conferred with Mr. Peyton, of the firm of Ingersoll & Peyton, and betook himself to Coal Creek, in Anderson county, where the explosion occurred, and actively solicited parties having rights

of action against the defendant company, or supposed to have such right of action against it, growing out of the deaths or injuries caused by the explosion, to intrust the prosecution of their cases against the company to the firm of Ingersoll & Peyton, representing to such parties that the firm of Ingersoll & Peyton was composed of able lawyers entirely competent to protect and secure their rights in the courts.

"It appears that when he reached the field of prospective litigation he found other lawyers there ahead of him, who were engaged in soliciting suits for deaths and injuries caused by the explosion.

207 "He entered actively into the competition for business.

"It does not appear, however, that he practiced any fraud or deception, or made any false representations, to get cases for his firm. He boldly and openly saw widows and others whose husbands and next of kin had been killed in the explosion, and sought, as other lawyers were doing, to have them intrust the bringing and prosecution of suits against the company to his firm.

"He made several trips to Coal Creek for the purpose of soliciting business for the firm, his expenses being paid by it.

"He secured some forty cases for the firm, and it appears from the record that one hundred and fifty or more other cases were brought by other lawyers against the company in the courts, all in a few months after the explosion.

"Chandler secured written contracts from the parties he procured to intrust their cases to his firm, and these contracts stipulated the fees the firm was to charge; it being a specified per centum of the recovery obtained in each case.

"He reported the cases he procured to the firm, and the firm brought suits in the circuit court of Knox county, except one, brought in Anderson, for damages in each against the defendants; the amount of damages in the writs usually being for ten thousand dollars.

"The firm prepared and filed declarations in all the 208 cases specified in the bill, and made investigations and prepared to try them.

"The firm were attorneys of record in the cases, and the defendants were notified of the fact that they were attorneys of record in the cases.

"Young Chandler, it appears, was not acquainted with the parties at Coal Creek, whose cases he procured for his firm,

and met them there for the first time. Indeed, so far as shown by the record, he was a stranger to the community at Coal Creek until he went there on this business.

"It appears that Judge Ingersoll, of the firm of Ingersoll & Peyton, was not aware of the first visits of young Chandler to Coal Creek on this business, and was not consulted with reference to his going there on the business before he went.

"We infer and find, however, that he was aware of some of his visits there for the purpose of securing cases. Indeed, he does not intimate in the record any objection to the course pursued by the young man in the matter, and, in argument before us, insists that it in no sense violates the law, however objectionable it may be to the professional taste of some members of the profession.

"It is only necessary to state further, to present the question raised by this assignment of error, that defendants, after complainants had taken the steps in their cases herein stated, conceived the purpose of compromising the damage suits against them, and commenced ²⁶⁹ negotiations for a settlement, by paying the plaintiffs in each case the sum of three hundred and twenty dollars.

"Messrs. Ingersoll & Peyton, it seems, declined to urge or advise their clients to accept this compromise, and thereupon the defendants, with respect to most of the cases mentioned in the bill, through their general counsel, employed other counsel or agents to negotiate a settlement ignoring complainants.

"These are the essential facts appearing in the record, necessary to be stated in disposing of the assignment of error under review."

The court of chancery appeals then proceeds to state the question involved, as it appeared to them, and to give their conclusions as follows:

"The question, under the facts thus stated, in its legal essence, is:

"If a lawyer accept cases and institute suit on them, which he knows were procured by open, personal solicitation of another lawyer from strangers to both, no fraud or misrepresentation appearing in the solicitation, the lawyer instituting the suits agreeing to pay the soliciting lawyer one-third of the fees legitimately chargeable in the cases, is he guilty of a violation of public policy and of his oath as an attorney under our statute, and hence, under the law, debarred the right

to recover his fees, no infidelity to the interest of his clients being imputed to him?

"The question with respect to the underlying principle
270 involved may be more briefly stated in another form:

"Is it a violation of the public policy of this state, and a contravention of the oath of a lawyer under our statute, for the lawyer to personally and openly solicit legal business from strangers to him?

"Our statute (Shannon's Code, sec. 5781) provides that the 'several courts of this state may strike from their rolls any person not authorized to practice in such courts, and also any practicing attorney or counsel upon evidence, satisfactory to the court, that he has been guilty of such misdemeanor or acts of immorality or impropriety as are inconsistent with the character or incompatible with the faithful discharge of the duties of the profession.'

"As a matter of general law, statutes of this character are not restrictive of the general powers of the court over attorneys practicing before it.

"Attorneys at law are officers of the court, and the court may exercise its jurisdiction over them, depriving them of their office and striking their names from the rolls.

"This power and jurisdiction are indispensable to protect the court, to attain the orderly administration of justice, to uphold the purity and dignity of the profession, and promote the public welfare and secure the interests of clients. It is a power inherent in the court itself, and exists independent of statutes, although statutes may regulate its exercise: *Ex parte Steinman*, 95 Pa. 220, 40 ²⁷¹ Am. Rep. 637; *People v. Green*, 7 Colo. 237, 244, 3 Pac. 65, 374, 49 Am. Rep. 351; *In re Henderson*, 88 Tenn. 531, 13 S. W. 413.

"Is the personal solicitation of business by a lawyer from strangers, the personal request to strangers that they intrust the bringing and prosecution of such suits as they may desire to bring to enforce their rights, an act of immorality, or an act of impropriety, inconsistent with the character or the duties of the profession?

"There is nothing immoral per se in the solicitation, unless the inherent nature and quasi official character of the labor involved in the pursuit of the profession in courts in the trial of cases make it so.

"Lawyers, as men, are as other men, and men in all other pursuits and professions solicit business.

“Merchants seek business by personal solicitation, and through paid agents seek it.

“Hotelkeepers strive for it by runners to meet trains, newspapers ask for it by paid solicitors and office-holders go for it and labor with much sweat to keep it.

“And even preachers sometime seek charges.

“But while lawyers, as men, are as men of other pursuits, and, generally speaking, no better and no worse, nevertheless, in the prosecution of their profession, they are differentiated from all other professions and callings.

“In the first place, they cannot practice their profession without a license.

“In the second place, they are required to possess a ²⁷² good moral character and certain legal attainments. In attending to legal business, especially in cases intrusted to them, they act as officers of the law and the courts, and in an important sense represent the public, in that it is their duty to aid in administering justice and preserving the integrity of the governmental agencies of the state, thus securing the confidence of the people in the honesty of their purpose, and aid to conserve the end for which they are established.

“We have found no decision of any court and no textbook authority holding that the personal solicitation by a lawyer to strangers to employ him to bring and prosecute such suits as the strangers may have the right to have instituted constitutes a violation of the lawyer's oath of office, or is such an act of impropriety as authorizes his disbarment under statutes similar to ours.

“It will not do to say that all solicitation of business by a lawyer brings him under the condemnation of the statute or renders him obnoxious to a correct standard of professional ethics.

“Most lawyers ‘hang out their shingles.’

“Many lawyers insert their professional cards in the newspapers, telling where they can be found and the courts they practice in and the character of business they are particularly fitted to look after. Proper advertisements and solicitations, addressed to the general public, are frequently resorted to by members of the highest standing in the profession.

“While different and varying standards of professional ²⁷³ ethics relating to the matter are honestly entertained by

different members of the profession, it is believed that the better standard, maintained by those accepted as representative of the spirit and nobler end of the profession, is that personal and special solicitations of particular persons, and especially strangers, to become clients, are unprofessional.

"The basic idea on which this standard must rest, it seems to us, is that an attorney, being an officer of the court in which he practices, and obligated by his oath to aid in eliciting the truth and administering justice in cases tried therein with which he is connected, by such personal solicitation, resulting in a suit intrusted to him, becomes a party to the suit in such sense that his fidelity to his client and to his personal interest in the result may lead him to ignore or forget the fidelity due from him to the court and the ascertainment of the truth, and the consequent enforcement of justice. But, whatever may be the standard with respect to this matter by different members of the profession, it is urged by appellants that our supreme court, in an order made on its own motion on an attorney to show cause why he should not be disbarred, has set the standard for this state.

"We are referred to the case of *In re C. W. Lester*, and the order made therein by the supreme court at its recent session at this place.

"Its order in said cause is as follows:

274 " 'At the present term of the court there has been presented a record in the case of Annie Gibson against the Southern Railway Company, involving an intervening petition filed in said cause by attorneys at law, in which they set out the fact that they were employed as attorneys to prosecute a suit in favor of Annie Gibson against the Southern Railway to recover damages for the alleged negligent killing of the husband of said Annie Gibson by that railway company.

" 'In this petition it is alleged that they had instituted suit on this claim in the circuit court of Knox county, in which pleadings had been made up; that a trial was ultimately had, in which there was a verdict in favor of Annie Gibson against the Southern Railway Company for four thousand dollars; but that on motion for a new trial, for reasons satisfactory to the judge of that court, this verdict was set aside, and a new trial was given.

" 'The petition further alleges that great labor was bestowed in the preparation of this cause by the attorneys, who

were satisfied that their client was entitled to a recovery after the granting of a new trial; that they made themselves ready once more for a new trial of the case, which was prevented by a compromise had at the instance of the Southern Railway Company with their client personally, and without the consent of her attorney, for the sum of six hundred dollars.

“ ‘Petitioners, in their said pleadings, alleging that under the statute made and provided therefor, they were entitled to a lien for their professional services upon the ²⁷⁵ cause of action, asked a reference to ascertain the value of their services, and, upon this being done, that they might have judgment against the railway for the amount so ascertained.

“ ‘There was an answer to this petition filed by the Southern Railway Company, after which a reference was made, and upon this reference proof was taken.

“ ‘Among the witnesses examined was one of these petitioners, C. W. Lester, and also the plaintiff in the suit of Annie Gibson.

“ ‘The deposition of Lester shows that through one Cunningham, a friend of Annie Gibson, he solicited employment in this case, being at that time an entire stranger to Mrs. Gibson, and that this recommendation for employment was made by Cunningham through a letter addressed to Mrs. Gibson, who was then residing in Johnson City, in this state.

“ ‘When the deposition of Mrs. Gibson was filed, certain letters, signed with the name of C. W. Lester and addressed to Mrs. Gibson at Johnson City, in one of which, to wit, of date August 11, 1905, following up the letter to Cunningham, he indirectly solicited employment in that case for himself and another attorney at the Knoxville bar.

“ ‘Among other letters so filed is the following:

“ ‘ ‘ ‘Knoxville, Tenn., Oct. 1904.

“ ‘ ‘ ‘Mrs. Annie Gibson, Johnson City, Tenn.

“ ‘ ‘ ‘Dear Madam: We write you a few lines to-day. I am unable to set up in bed. Guess you heard of me being ²⁷⁶ in the terrible railway wreck near Newmarket some days ago. It will more than likely be fifteen or twenty days before the case is reached. Maybe by that time you will have the money to come to Knoxville. I hope you will. We must try at this term of the court. It occurred to me that you might know some of the Johnson City people who were in the wreck and could influence them to turn their business over to Hon.

S. G. Heiskell and myself. If you succeed in doing this, we will pay you \$25 and \$50 in each case. You must keep this to yourself. I think surely you or your friends might manage a part of them. You can tell them this is the place to bring suit. I am in possession of facts no other attorney knows of. I have written Mr. and Mrs. J. H. Schroll, 405 W. Market street, of Johnson City. I referred them to you, and that you could tell them about Mr. Heiskell and myself.

“ “ “Thanking you for what may be done in our behalf, I am,

“ “ “Yours truly,

“ “ “C. W. LESTER.”

“ “It appearing on the face of the record that the conduct of said Lester in these respects was a breach of his duty as a lawyer and citizen, the court of its own motion makes a rule upon him to show cause why he should not be stricken from the roll of attorneys on this court. This rule is returnable on Friday morning, December 1, 1905.”

“The insistence of appellants is that the supreme court in the above order, made of its own motion, established the rule in this state that a lawyer who solicits the suit of a stranger through an acquaintance, who is a ²⁷⁷ friend or acquaintance of the party supposed to have the right of action, or who solicits a party to get suits for him, promising to pay for this service, in either case commits a breach of his duty as a lawyer, contravenes the public policy of the state, and subjects himself to disbarment and to the deprivation of the right to collect his fees in cases thus secured.

“So far as we are advised, the supreme court has not finally acted in the case of Mr. Lester, still having it under advisement. It has delivered no opinion, written or oral, so far as we are aware, touching this matter.

“It is quite true that its order in the latter case, in its terms, is plainly susceptible of the construction that in its opinion, tentatively expressed, so to speak, in an order in the nature of an interlocutory order, or conditional order, a lawyer who solicits the suit of a stranger, through an acquaintance who is a friend of the stranger supposed to have the right to bring suit, or who solicits a party to get suits for him, promising to pay for such services, violates his duty as a lawyer and citizen, and subjects himself to disbarment, either under our statute or the common law.

“If the supreme court shall hold in its final opinion in the Lester case the rule prescribing the standard of professional conduct as contended for by appellants, we will follow and indorse it in all cases coming before us in which the facts present a case calling for such action on our part.

“But having found, after diligent search through all ²⁷⁸ the reports and text authorities accessible to us, no case nor text authority that makes such solicitation of business by a lawyer a ground for disbarment or for depriving him of his fees (no fraud, deception, misrepresentation, nor infidelity to the rights of clients so obtained being imputed to him), under our statute or similar statutes in other states, we are unwilling, until the supreme court so establishes the rule by an opinion thus construing our statute, or announces it as a principle of the common law, or until the legislature establishes it, to adopt and enforce it in this case, whatever may be our opinion as to the impropriety or reprehensibility of such solicitation on the part of a lawyer. As before stated, we think the correct standard of professional ethics on the part of the profession relative to this matter, illustrated by its best exemplars, does not sanction such solicitation.

“But, as we understand our function as a court, it is not our duty or province to decide this case and the rights of these complainants, with respect to the subject under review, by a rule or standard fixed or upheld by the ethics of the profession of law as advocated and followed by the highest and most eminent members of the profession, nor the lowest, nor all, the members, but by the law, either as established in the body of the common law as adopted in this state, or as enacted by the legislature.

“To construe our standard herein quoted (Shannon’s Code, sec. 5781) as subjecting an attorney to disbarment who solicits parties, in person or through another, ²⁷⁹ having suits in court, to prosecute or defend them, pushed to its logical end, would or might be far-reaching in effect and operation.

“It is common knowledge that some of the most eminent lawyers in the state have requested in person, as well as solicited, men of prominence and judges of our courts, intermediate and final, to recommend their appointment and employment by corporations and other large concerns as their regular attorneys to attend to all their legal business, or all their suits arising in a certain territory, and it is reasonably

certain that they were employed as the result of such solicitation, indorsements and recommendations.

"We have never heard it suggested that an attorney thus soliciting business and getting it rendered himself obnoxious to the statute and subject to disbarment.

"If a large business in its operation causing or originating successive suits can be solicited by a lawyer in person or through another en bloc, a separate fee being charged in each case, we see no reason, in the principle of the thing, why he cannot thus solicit employment in the cases separately considered.

"An honorable lawyer will deport himself with the same dignity and regard for professional propriety in the one instance as in the other.

"The writer has no hesitancy in saying that he has but little, if any, regard or respect for the professional ethics of what is called in the slang of the day 'the ambulance chasers' in the profession.

²⁸⁰ "But, so far as we are advised, not even the Bar Association of the state has established or pronounced a rule condemning the method of getting business resorted to by the 'ambulance contingent.'

"It has, we believe, taken the position that it is highly unprofessional for one lawyer, to use the language of the late Judge Guild, deceased, to 'gouge in' and try to take the case of another lawyer out of his hands.

"But, so far as we have been able to find authorities dealing with statutes similar to ours above quoted, the 'misdemeanors' or 'acts of immorality' or 'impropriety' coming under their condemnation and calling for the disbarment of the lawyer guilty of them are such acts on the part of the lawyer as emanate from an immoral character, or show that he is unworthy of public confidence and unfit to be intrusted with the conduct of cases in the courts: *In re Henderson*, 88 Tenn. 531, 13 S. W. 413; *Serfass' Case*, 116 Pa. 455, 9 Atl. 674; *People v. Appleton*, 105 Ill. 474, 44 Am. Rep. 812; *In re Wall*, 13 Fed. 814, 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27 L. ed. 552; *Baker v. Commonwealth*, 10 Bush (Ky.), 592; *Dicken's Case*, 67 Pa. 169, 5 Am. Rep. 420.

"These statutes have, so far as we can find in the books, no relevancy to, and are not directed at, the mere methods the lawyer may resort to to secure his employment in cases

that parties have the right to bring in the court, where no fraud or deception is practiced to get the cases.

“It is to be regretted, perhaps, that the legislature has ²⁸¹ not enacted a statute covering the case of the ‘ambulance chasers,’ as they are sometimes called in the profession; but until it does, and until it pronounces in legislation a condemnation of the personal solicitation of business by a lawyer, or his solicitation of business through another, or until the supreme court in a final opinion establish the rule that condemns such solicitation and makes it a ground for disbarment, we are unwilling to establish it under a construction of our statute, or as embodied in the common law enforced in this state, basing such construction on our conception of the code of professional ethics that should control members of the profession.

“Complainants are not repellable from court under the facts of this case on the grounds of champerty, maintenance or barratry.

“Our statute now permits the contracting for a contingent fee by a lawyer, and it is believed that our supreme court has, in view of our legislation, announced that the doctrine of maintenance, as a punishable offense, does not prevail in this state.

“But, if it does, as the offense is defined by the common law, these complainants were not, under the facts, guilty of the offense.

“Maintenance, as generally defined, is an officious intermeddling in a suit by one that has no connection with it, by maintaining or assisting either party with money or otherwise to prosecute or defend it: 4 Blackstone’s Commentaries, ²⁸² 149; *Perine v. Dunn*, 3 Johns. Ch. (N. Y.) 508; *Bristol v. Dann*, 12 Wend. 142, 27 Am. Dec. 122.

“Maintenance is somewhat akin to barratry, which, under the common law, is the offense of frequently exciting or stirring up suits and quarrels, either at law or otherwise.

“Lord Coke defines a common ‘barrator’ as ‘a common mover or exciter or maintainer of suits, quarrels of parties either in courts or elsewhere in the country. In courts, as in courts of record, or not of record, as in the county, one hundred or other inferior courts in the country in three manners: First, in the disturbance of the peace; second, in taking and keeping possession of land in controversy, not only by force, but also by subtlety and deceit, and most commonly by sup-

pression of truth and right; thirdly, by false inventions and sowing of calumniation, rumors, and reports, whereby discord and disquiet may grow between neighbors': Coke's Littleton, 368.

"Generally by statute, common barratry is the practice of exciting groundless judicial proceedings.

"It is a common-law offense and misdemeanor, punishable by fine and imprisonment at the discretion of the court, and, when an attorney is the offender, by his disbarment.

"The conduct of complainants, as disclosed by the record, simply amounted to the solicitation of parties to intrust the prosecution of their suits, or supposed rights of action, to them as their lawyers.

283 "If complainants are amenable to the rule invoked by appellants, under which they are charged with violating their oaths as attorneys under our statute, appellants can make the question in this case.

"Parties coming into a court of equity seeking affirmative relief must come, as the books have it, with 'clean hands'; otherwise they will be repelled.

"The 'uncleanness of hands' charged here is that they solicited strangers to intrust the bringing and prosecution of suits the strangers thought they had the right to bring to them.

"We have disposed of this charge so far as it affects the right of complainants to charge their legitimate fees in the cases referred to in the pleadings.

"We do not think there is any substantial merit in the other assignments of error of appellants, except their second error assigned.

"The fee mentioned in said second error assigned should be one hundred and eleven dollars and thirty-six cents, instead of one hundred and twenty-one dollars and thirty-six cents, as appears in the decree of the chancellor.

"We infer this error occurred in calculation, as one hundred and eleven dollars and thirty-six cents is in accord with the basis fixed and the holding of the chancellor.

"This assignment of error is sustained to the extent indicated.

"All other errors assigned are overruled.

"The Messrs. Camp, who were defendants to the various suits mentioned, having participated in their compromise, settlement and their dismissal without the ²⁸⁴ consent of

complainants as attorneys of record in the cases against them, will not be heard to deny their liability for the reasonable fees of complainants up to the amount they advised and participated in the payment of as a compromise thereof.

“This disposes of all the questions in the case. The decree of the chancellor will be affirmed, with costs.”

We have set out this finding, in order to state the entire and exact facts which we are called upon to consider and pass upon.

We state the contentions of the complainants. It is insisted for them, in the language of H. H. Ingersoll, their attorney:

“(1) Freedom of contract is a personal liberty and a property right, guaranteed by both state and federal constitutions, as well as an inherent right guaranteed by the Declaration in the ‘pursuit of happiness’: *People v. Williams*, 101 N. Y. Supp. 562, on the factory labor act.

“(2) Lawyers employ this right and liberty in the same measure and to the same extent as other citizens, they may contract in the same mode and manner as others, and their contracts are valid unless contrary to law: *Newnan v. Washington*, Mart. & Y. 79; *Weeks’ Attorneys at Law*, sec. 185.

“(3) The summary jurisdiction of courts over contracts of lawyers in their fiduciary relation to clients is exercised for the protection of the clients, and does not extend to a lawful contract of retainer, wherein the ²⁸⁵ parties deal at arms’ length, and the fiduciary relation does not exist: *Weeks’ Attorneys at Law*, sec. 364.

“(4) The validity of a contract of retainer, in whatsoever form and howsoever affected, whether sought by client or lawyer, is determined by the same rules of law as other contracts; and, having the mutual assent of the parties, it withstands impeachment unless unlawful—i. e., (1) contrary to positive law; (2) contrary to positive morality; (3) contrary to public policy.

“Impropriety is not ground for nullifying a contract: *Newnan v. Washington*, Mart. & Y. 79; *Wald’s Pollock on Contracts*, 243.

“(5) There is no public policy in Tennessee forbidding lawyers to solicit business. No statute directly or indirectly denounces it. On the contrary, all Tennessee legislation relating to the subject for the last twenty years has liberalized lawyers’ contracts, and encouraged contracts theretofore considered of doubtful propriety.

"All lawyers seeking for business directly or indirectly solicit it. The common law permits solicitation by attorneys: Green Bag, October, 1906; 1 Tidd's Practice, 60.

"Complainants sued, as attorneys of record of ten plaintiffs, whose suits had been compromised and dismissed, to recover of defendant the amount due them as fees from said plaintiffs for which they had statutory liens upon the causes of action of the compromised cases. Defendants' answer was full of denials and groundless assertions made by way of defense. Complainants proved all their allegations. Defendants ²⁸⁶ proved only two of their assertions, to wit: (1) That complainant Chandler solicited the cases, and (2) brought them to Ingersoll & Peyton to institute and prosecute for said plaintiffs on a division of fees, which defendants insist was 'illegal and altogether improper,' and therefore prayed that the suit be dismissed. The chancellor overruled this defense and gave decree for complainants. Defendants appealed and repeated their contention before the court of chancery appeals, which expressly declined to make any ruling upon the 'altogether improper' phase of the litigation, on the ground that the court was not 'censor morum,' nor 'arbiter elegantiarum,' but merely 'judex litium,' in which character it took jurisdiction of the legality of the contract, and decided that, inasmuch as it knew of no law invalidating a lawyer's contract merely because he proposed it, and defendant had produced none to that effect, the decree of the chancellor must be affirmed.

"Defendants, still being dissatisfied, have again appealed, and renew their said contest in this court, assigning for error (1) that in no event should decree be rendered against Camp & Son, as they were only officers of the codefendant company; (2) that complainants' relation as attorneys was the result of their own solicitation, and therefore the contracts for fees were illegal and void, and improper; and the bill should have been dismissed because complainants' hands were unclean, and they deserve disbarment, from which counsel graciously excuses them!

²⁸⁷ "A glimpse of the defendants' orthodox views on legal ethics and professional proprieties may be had from the finding that, when complainants declined to urge their clients to accede to defendants' proposed terms of compromise, defendants then employed other lawyers for plaintiffs in said actions, who would accept their terms.

“For full statement of these facts made by the principal defendant, see complainants’ brief before the court of chancery appeals, showing that complainants’ refusal to betray their clients necessitated this suit.

“Since defendants now graciously remit disbarment, a subject not in this case, ‘aut allegatis aut probatis,’ complainants will be excused from following defendants into the alluring field of ethics, and be allowed in this brief merely to discuss the two assignments of error made upon the matters at issue in the suit.

“(1) *Nonliability of Defendants’ Camp.*

“The finding of fact on this point is that they participated in the compromise and dismissal of suits to which they were defendants and are therefore liable for complainants’ fees.

“Defendants in their brief assert the facts to be otherwise, and feebly argue on their own assertions their nonliability for fees.

“Complainants rely upon the statute law, apparently ignored by defendants, that the finding of fact by the court of chancery appeals is conclusive even upon them, and there is, therefore, no escape from the conclusion of ²⁸⁸ that court that defendants participating in the compromise and payment of the plaintiffs’ demands are liable under the statute for the fees of their attorneys of record.

“(2) *Illegality of Demand.*

“To this assignment, appellees have two replies:

“(1) This objection is not open to appellants.

“They are strangers to these contracts; and, if the parties thereto are content, strangers cannot object to them. The general doctrine is that the objection of illegality of contract is personal, and can be made only by parties and their privies: *Cleveland v. Miller*, 94 Mich. 97, 53 N. W. 961; *Williams v. Simpson*, 70 Miss. 113, 11 South. 689; *Wood v. Erie R. Co.*, 72 N. Y. 196, 28 Am. Rep. 125; *Ohio Life Ins. Co. v. Merchants’ Ins. Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742, as to incidental illegality. Also *Jones v. Davidson*, 2 Sneed, 447.

“These contracts are not void, and only parties could avoid them. This rule is applied in Tennessee, even in cases of usury, where public policy is involved: *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; *Nance v. Gregory*, 6 Lea, 345, 40 Am. Rep. 41.

"If these contracts, instead of being fair and valid, had been fraudulent, still defendants could not have pleaded that fraud, such defense being personal to the debtors: *Smith v. Greaves*, 15 Lea, 459.

"A fortiori, they cannot make such defense where the ²⁸⁰ contracts are free from fraud or illegality, and impropriety is the only defense.

"(2) The contracts were not illegal.

"The court of chancery appeals find and report that there was no fraud, deception or false representations connected with them, nor any champerty, maintenance, or barratry.

"No statute is cited which has been violated. Illegality is charged solely upon the fact that Chandler, an attorney at law, solicited the cases, and thus obtained retainers by the plaintiffs in the actions at law for the counselors, Ingersoll & Peyton, who faithfully demeaned themselves therein according to the best of their skill and ability.

"This legal question, then, is sharply presented: Is a contract of retainer illegal merely because it is solicited?

"It is admitted by appellants' counsel that no statute forbids lawyers to solicit business, and that no text-writer states this to be the law; but they insist it must be the law because, forsooth, no one ever said it was not the law!

"The cases of *Langdon v. Conlin*, 67 Neb. 243, 108 Am. St. Rep. 643, 93 N. W. 389, 60 L. R. A. 429, and *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483, cited as controlling authority for defendants, are not even analogous to this one. They were both actions brought by laymen against lawyers to enforce ²⁸⁰ contracts for division of fees in cases brought to the lawyers by the laymen, instead of an action by lawyers to enforce a statutory lien for their fees. The decisions in both cases remove them even further from this one, for they are expressly based upon statutes of Nebraska and Colorado, forbidding the acts on which the laymen based their suits!

"Maires' case likewise arose under a special statute of Pennsylvania against barratry in hiring laymen to bring cases to attorneys. Similar statutes exist in New York and other states, under which attorneys have been disbarred; but no layman, or act of layman, is involved in this case. Chandler, though not exercising the functions of a barrister, was a licensed attorney and solicitor, and was protected by the

ancient law permitting solicitation, and practiced in England to this day: Green Bag, October, 1906.

“Defendants being thus without any book of law, statute, decision or text-book, on which to rest their plea of illegality, ask the court to declare these contracts illegal because solicitation of employment by lawyers is obnoxious to public policy; and yet they cite no statute, no rule of ethics, nor common-law authority to show such public policy. Not a word, or hint, even, is found in the code sections cited to sustain the proposition that solicitation is illegal. Indeed, it cannot be affirmed that the legislature, in enacting these sections, had in mind any contract establishing the relation of attorney ²⁹¹ and client. They relate rather to the misconduct of the attorney in that relation.

“The ‘good cause’ loosely mentioned in section 5783 must, of course, refer to statutory cause, or some common-law cause, then recognized as sufficient.

“But solicitation was not only not a cause for disbarment at the common law, but was recognized as a commendation for admission to the bar: 1 Tidd’s Practice, 60.

“The ‘clean hands’ invoked by a far cry to excuse defendants from the payment of their lawful debts can have no application, unless complainants’ contracts with their clients have defrauded defendants: Snell’s Equity, pp. 38, 39; 1 Pomeroy’s Equity Jurisprudence, sec. 400.

“Here the very contrary is the fact: Complainants are expressly acquitted of any fraud, while defendants, by their device of employing another attorney to act for complainants’ clients in the matter of the compromise, and refusing to pay complainants’ statutory fees, themselves show dirty hands!

“Defendants’ insistence that their view of the law must be correct, since their counsel can find no case to the contrary, is sustained by Thomas Gray in the memorable words, ‘Where ignorance is bliss, ’tis folly to be wise,’ and will warrant the coining of a new legal maxim, not found in Broom, or any other author, but appropriate to defendants’ contention: ‘The law is always with you, if you find nothing to the contrary!’

“The record of the Lester or Gibson case shows a bartrous correspondence of such flagrance as to move ²⁹² the court sua sponte to make a rule on counsel to show cause against disbarment. If there were anything in this case to suggest such a rule, that case might be a precedent; but,

lacking entirely the virus which inoculated it, to be immune from censure.

"The decision of the chancellor and the court of appeals rests on firm foundations: 'Complainants were legal and fairly made. They cannot be impeached or annulled for mere impropriety. They obnoxious to some law—some rule of conduct pre-competent authority and existing at the date of contract can find none, and have been shown none, which they can vene. We must, therefore, hold them lawful, and it accordingly.'

"The plain question is whether a frank, open, request for a retainer invalidates the contract of employment made thereupon to bring and conduct a lawsuit. A lawyer may seek employment in some manner. They may do it by friends, or cards, or advertisement, or local puffs, or commendation of other lawyers, or of judges, or in any conceivable methods, generally indirect; but all these are lawful solicit cases and fees.

"Confessedly, all these methods are lawful, and contracts made thereon are valid. Usually the client seeks the lawyer. But, suppose the lawyer goes to the client and solicits his business, and it is given to him by the client or firm or person by annual retainer; would such a contract be invalid? No man will say it.

203 "In principle what difference is there, if the lawyer seeks a single case only, instead of a general retainer for the fee directly, rather than indirectly? Does the law reward or approve indirectness, and censure frank directness? What element of a valid contract is present in the first and absent in the latter?

"This legal contention is not a question of etiquette or of law.

"Chandler's method of direct approach and solicitation is not in general favor with the bar, and would not be with clients. But some lawyers and some clients like the method and pursue it. Are their contracts, freely, fairly, and standingly made, without compulsion or constraint, without advantage or fraud, unlawful? Is there any mandate to the lawyer: 'Thou shalt not solicit cases?' If such a law is lawful, but not otherwise. There is no statute to that effect, nor any rule of court. 'Law is a rule of civil conduct prescribed by the supreme power,' says Blackstone. It is

properly be a law, unless notified to those who are to obey it. It was not found in the common law, either in text-books or decisions. On the contrary, attorneys and solicitors were expected to solicit business, just like other persons, and did it through the centuries, and do it now: Green Bag, October, 1906.

“Barristers did not, perhaps, because that was not good form at the Inns of Court; nor could they sue for their fees. But the rules of the Inns of Court do not apply to the American lawyer. Like the English solicitor ²⁹⁴ or attorney, he may solicit and sue for his fees; for he performs the very services which they did. He is not only a professional man, like the barrister; he is also a business man, like the attorney or solicitor; and he has the rights of both: *Newnan v. Washington*, Mart. & Y. 79.

“Public policy is said to forbid soliciting fees, and to invalidate a contract for fee, if the proposition is made by lawyer and accepted by client, rather than vice versa; and to sustain this contention sections of the code are cited, which not only do not forbid it, but do not even in the most remote way refer to it.

“It is begging the question to say that it is a professional impropriety to solicit a fee. It assumes that there are other than legal standards for determining professional propriety, and that impropriety amounts to illegality, whereas there is in Tennessee no standard but a legal one for testing legal rights; and the censure of the bar, even a resolution of the State Bar Association, denouncing solicitation, would not nullify a contract obtained in that way. Legal rights do not depend on bar resolutions. The legislature might invalidate such contracts by statute; possibly the judiciary might make a rule having that effect; but surely, until the legislature has so enacted, or the courts have promulgated such a general rule, contracts valid at the common law may not be nullified by them because one lawyer, or a hundred lawyers, or even a court, should think this method of obtaining practice improper, as beneath high professional ²⁹⁵ standards. Such a law would not retroact, for that would impair the obligation of a contract; a fortiori, such a rule of court could not.

“The ‘other good cause’ in code, section 5783, can mean nothing more than lawful cause, and cannot be stretched so as to embrace the private or professional views of any number of gentlemen, however reputable; for this is a court of law, and

this is a government of law, and not of men or of functionaries. This phrase 'other good cause,' for whatever purpose considered, then, must be limited to statutory or common-law causes. It would include barratry, champerty, embracery, forgery, false pretenses, and other criminal acts affecting contracts, and such other acts as the courts of common law had declared illegal and were recognized as in force in America. Surely it could not go beyond these.

"Now, what acts were so regarded are set forth in detail in 1 Bacon's Abridgment, 421 et seq., and in the long roster of offenses or misbehavior of attorneys, including all manner of unprofessional conduct, such an offense as soliciting cases is not mentioned. Therein are denounced fraud and corruption, unauthorized appearance, using another attorney's name, practicing without license, protracting suits, making unnecessary costs, claiming fees for work not done, refusing to deliver papers or pay over money of clients to them, taking out capias when there was no original forging a writ or otherwise imposing upon the court, colluding to bring a groundless suit or support a frivolous complaint, and ²⁸⁸ other like acts showing infidelity or dishonesty; but no intimation is there of solicitation being unlawful or ground for disbarment.

"So, likewise, in 1 Comyn's Digest, 760, under 'what things an attorney ought not to do,' in a whole page list of forbidden things, such as to practice deceit or beguile the court, to bring a collusive suit or plead a false plea, to raze a record or forge a writ, to practice champerty or extortion, to be an ambidexter or to withhold a writ on the day appointed for trial, and many other like things, not a hint is given that he may not solicit cases; but (page 767) he had the privilege to sue for his fee, which a counsel had not.

"Nor does Blackstone, our great tutor of the common law, hint at any such disqualification. Nor in the forty pages on 'Attorneys' in Tidd's Practice, page 60 et seq., is there any allusion to it. So, also, in America, our standard writers, Kent and Weeks (on Attorneys), and even Sharswood's Ethics, make no mention of such a rule. And in those great modern monuments of professional research and publishers' enterprise—American and English Encyclopedia of Law and Cyclopedia—purporting to give an abstract of the law from all American cases and reference to them, wherein scores of pages are devoted in text and notes to attorneys, not a case is mentioned wherein an attorney has been disbarred, or his

contract for fees annulled, for soliciting a cause, unless in so doing he had been guilty of champerty or barratry, or had violated some statute of the state; and yet therein are cited scores of cases ²⁹⁷ for all sorts of professional peccadilloes, which is a sine qua non of professional offense. In Cyclopaedia, particularly, the grounds are set forth methodically under eight separate heads—'Bad Character,' 'Conviction of Crime,' 'Fraud in Procuring Admission,' 'Fraud Toward Clients,' 'Improper Treatment of Court,' 'Misuse of Records,' 'Non-professional Conduct,' and 'Professional Misconduct'—and scores of cases are cited under each head, showing more than one hundred causes of disbarment; but nothing in any of them suggests solicitation of causes as illegal or improper in an attorney.

"In the eight hundred pages given by Mr. Weeks to Attorneys at Law, treating his subject historically and analytically, there is no statement that either in England or America it was ever ruled that it was unlawful, or even improper, for an attorney of any kind to solicit employment, directly or indirectly. Per contra, after alluding to the old rule requiring a power of attorney from the client to warrant the appearance of the attorney in his cause (185) and its entire abolition in America, so as to allow retainer by parol, he states the present law to be: 'The contract of retainer may be made, like any other. It may be express or implied.'

"After this trust relation is established, then all dealings between them are subject to the strictest surveillance, and the onus of showing perfect fairness is upon the attorney; but the retainer, whereby the relation is established, is, both as to form and substance, tried by ²⁹⁸ the general rules of contract law: *Newnan v. Washington*, Mart. & Y. 79.

"This is but saying that all an attorney's dealings are subject to the general rules of law controlling the contracts of other persons; the retainer by the general contract law, applying to all classes of persons entering the contract relation, and all later dealings by the rule of 'uberrima fides,' controlling all trustees and fiduciaries.

"And in a republic, where equal protection of the law is guaranteed, and the same rules of action, by constitution and institution, are applied to all persons, without regard to class, how could it be otherwise? Either law, promoting justice, or discretion, which is the rule of tyrants, is the sovereign power over us; and it would be a strange comedy of life if lawyers

could not claim the protection of the law. Indeed, the general trend of opinion, professional, judicial and lay, is that, being ministers of the law, they are most of all men its subjects. Whatsoever is unlawful they may not do with impunity. If they violate the law they are subject to its punishment. And, correlatively, whatsoever is permitted to others is also allowed to them, as citizens. The benefits as well as the penalties of the law are theirs, equally with other citizens, whether in the domain of law or equity, in torts or in contracts. Whatsoever contracts others may make, so may they; howsoever other in consimili casu may make contracts, so may they. In their contracts with strangers, they deal at arms'-length; with ²⁹⁹ clients, they must beware of the trust relation and its obligations. Such is the American law, and there is no precedent to the contrary. Lawyers and judges have searched the year books, the hornbooks, the reports, and the text-books, treatises and commentaries, digests, and cyclopedia, sedulously, eagerly, for an opposite case; but all in vain!

"There is abundant authority for annulling contracts, conceived in fraud or obtained by unlawful means, but not a single utterance to the effect that a contract fairly made, and not made in violation of any statute or rule of the common law, is void, merely because one or the other party thereto proposed or solicited it. Defendants' contention is unwarranted either in principle or authority, and, to come to the truth of it, seems to be a studied effort to introduce a new element into the law of contracts—a special rule for lawyers' retainers, not applicable to any other class of citizens: 'Woe to the lawyer who seeks retainers; if you invite or solicit causes, your name is—Denis, and your case is—Mud!'

"Such an abnormal graft upon the tree of justice would warm the cockles in the bosom of directors and officers of the accident insurance companies, all the railway companies, street and commercial, and all other companies maintaining an organized force of expert compromisers, who with automobile outfit compete with 'ambulance chasers' for the first interview with the wounded, and who are generally successful, as being better prepared for the emergencies of the business. Only ³⁰⁰ give them this rule, that a solicited fee is void, and their monopoly of business is established, competition is banished, rivals are crushed, the trust rule is enthroned. Thereafter, with their regular physican to assure the victim in all the confidence of learning and friendship that his injury is slight and

temporary, the law agent may obtain the accord and satisfaction receipt for a trifle; and a long step is taken in the road that exempts them from justice!

“ ‘Able papers’ have been read before the bar associations by distinguished general counsel to induce professional denunciation of the practice, and petition for legislative action; but in vain. Nor does it matter what any bar association may have resolved. They have not even the power of Inns of Court to recall from the bar any whom they may have called to it. They cannot fix public policy; that function is governmental; and the legislature of Tennessee, instead of limiting the liberty of attorneys, has enlarged them by repeal of the champerty laws, the increase of pauper rights, and the extension of lien from judgment to cause of action, thereby indicating plainly a public policy contrary to that asserted by appellants.

“It is mere cant and hypocrisy for attorneys to denounce the solicitation of cases. Those who have business have sought it, some by advertising, some by recommendation, some by pipe-lining, some by indirect request, and some by direct solicitation. Shall all be disbarred? Shall all sought retainers be nullified? If not, then ³⁰¹ where shall the line be drawn? Shall it be the line of propriety? If so, who shall draw the line? The majority of the profession, or its best members? And who shall elect the best? And by whomsoever drawn, how shall it be done? Such lines befit a ‘court d’honneur’; but obviously no such standards of judgment as to legal right can obtain in a court of law. The legal standard is the only one for deciding legal rights of lawyers or other suitors. And the sole question in this case, as in all others, is, What is the law?

“This standard defendants and other parties have often invoked in this court; and none other is tolerable! It was employed in the Gibson case, when Lester’s fee was disallowed, not merely because he solicited a fee, but because the evidence in the case disclosed barratrous solicitation toward the railway company generally as to the Newmarket wreck, in which Gibson was injured, so plainly as to show the Gibson contract barratrous, and therefore unlawful, so much so as to require the court sua sponte to exercise its summary jurisdiction, and require Lester to answer as to his unlawful conduct. So, also, in this case, would the court, notwithstanding appellants’ pre-tentious pardon, make the same rule, if there were evidence

of improper professional conduct in making a barratrous or otherwise unlawful contract. But here the entire freedom of the retainers sued on from fraud or illegality of any kind is expressly adjudged by the court of chancery appeals, and nothing is here to invite or suggest such action against complainants, ³⁰² whatever may be the court's opinion of appellant Camp's performance with Cross; and they are immune, not by virtue of defendants' pardon, but from their decreed innocence of wrong, having merely exercised their inherent liberty of lawful contract. For this reason the Gibson case is not a precedent for this as to the matter involved in it—the contracts for retainer. The contract of Lester was illegal, while those obtained by Chandler were lawful contracts, and therefore inviolable on mere notions of propriety, however high their origin or confident their champion.

“Complainants' suit upon these contracts is a legal demand made in the chancery court and triable by rules of law, and by no other standard; and no authority being found for impeaching these contracts, no law annulling them, the decrees of the chancellor and the court of chancery appeals should be affirmed.

“P. S. If the woman proposes, and lawful marriage ensues, will her proposal make the issue bastards?

“H. H. INGERSOLL,
“Counsel for Complainants.”

Before proceeding to dispose of the main question argued, we think it only necessary to say that we are of opinion that, if the coal company is liable in this action, so are the defendants Camp individually, for the reasons set forth in the opinion of the court of chancery appeals—that they participated in, and really brought about, the compromise and payment of the plaintiff's demands, ³⁰³ and were sued by the plaintiffs jointly with the coal company.

It is said that the objections raised to the complainants' demands are not open to the appellants, because they are strangers to the contract. We think this assignment not well made. If the contracts made are void, then these parties can avoid them, because upon the contracts must be based the liability of the defendants to a money decree. There may be a question, or questions, involved in the case personal only to the complainants, and with which the defendants are not concerned, but they are concerned so far as the facts constitute a ground of recovery against them.

It is insisted that the contracts made are not illegal. This, we think, does not reach the root of the case, as the contracts themselves, abstractly considered, may be legal, and yet there may be circumstances surrounding their making which would deter the courts from enforcing them, or rights based on them, when all the facts are divulged and the nature of the consideration appears.

Appellees state the legal question thus: "Is a contract of retainer illegal merely because it is solicited?" Evidently the question in this case is not so broad as this statement, but should be limited to such solicitation and facts as appear in this case.

We have no express statute defining what an attorney may or may not do in the prosecution and practice of his profession. The code of ethics which the general assembly has prescribed can be gathered largely from ³⁰⁴ the statutes which lay down causes for disbarment. Section 5781 of Shannon's Code prescribes: "The several courts of this state may strike from their rolls any person not authorized to practice in such courts, and also any practicing attorney or counsel upon evidence satisfactory to the court that he has been guilty of such misdemeanor or acts of immorality or impropriety as are inconsistent with the character or incompatible with the faithful discharge of the duties of his profession."

Personal solicitation of a suit is not specifically mentioned as one of the grounds of disbarment; but it is evident that the legislature did not intend to limit the power of disbarment to the causes specifically mentioned, but an attorney may be disbarred for any good cause: Shannon's Code, sec. 5783.

The legislature well knew that it could not particularize every ground for disbarment, and it also well knew that attorneys were officers of the court, and that courts have the inherent power to keep their forums pure by removing therefrom all parties appearing therein whose practices and acts tend to make them impure, or to impede, obstruct and prevent the administration of the law, or destroy the confidence of the people in such administration. Our statute was passed in 1817, and amended in 1821: Acts 1817, c. 51, sec. 1; Acts 1821, c. 66, sec. 3.

To the honor of the profession, but few occasions have arisen for its enforcement, and still less for its proper construction. The language of the act is very broad, ³⁰⁵ and places the profession of the law upon a high and honorable

plane; and it has been the effort of the bar, and, so far as lay in its power, the bench, to observe and maintain that high and honorable status.

In the leading case of *Hornberger v. Planters' Bank*, reported in 4 Cold. 531, this court, through Special Judge E. H. East, one of the ablest lawyers that ever adorned the bar or bench of Tennessee, said, when speaking of the relation of attorney and client: "This brings us to the consideration of the relation of attorney and client, and in this we have derived great aid from English decisions, as well as those of our own courts; and a review of these decisions shows most conclusively that the relation is one of great delicacy, extremely fiduciary in its character, and he who has strictly guarded against committing any breach of it in the course of a long practice has continually cultivated the highest virtues of his nature": Pages 566, 567.

And again: "An attorney is a man set apart by the law to expound to all persons who seek him the laws of the land, relating to high interests of property, liberty, and life. To this end he is licensed, and permitted to charge for his services. The relation he bears to his client implies the highest trust and confidence. The client lays bare to his attorney his very nature and heart, and leans and relies upon him for support and protection in the saddest hours of his life. Knowing not which way to go to attain his rights, he puts himself ~~and~~ under the guidance of his attorney, and confides that he will lead him aright."

This was spoken in a case in which dealings between attorney and client were involved; and the case is not cited, because in its facts it is entirely in point and similar to the present case, but to show the estimation in which an attorney is held and regarded by this court, and with what concern and care the conduct of attorneys is watched over by it.

We refer to only a few of the many cases in which the courts have been called upon to give expression to their views as to what constitutes unprofessional conduct.

In *People v. MacCabe*, 18 Colo. 186, 36 Am. St. Rep. 270, 32 Pac. 280, 19 L. R. A. 231, the court, speaking through Elliott, J., said: "The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce, when convinced that a client has a good cause; but

for anyone to invite or encourage such litigation is reprehensible."

In *People v. Brown*, 17 Colo. 431, 30 Pac. 338, cited in *People v. MacCabe*, 18 Colo. 186, 36 Am. St. Rep. 270, 32 Pac. 280, 19 L. R. A. 231, the court said: "When this court grants a license to a person to practice law, the public, and every individual coming in contact with the licensee in his professional capacity, have a right to expect that ³⁰⁷ he will demean himself with scrupulous propriety, as one commissioned to a high and honorable office."

In the case of *People v. Goodrich*, 79 Ill. 148, referred to and approved in *People v. MacCabe*, 18 Colo. 186, 36 Am. St. Rep. 270, 32 Pac. 280, 19 L. R. A. 231, the court, speaking through Mr. Justice Breese, said: "This court, having power by express law to grant a license to practice law, had an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant. In granting the license it was on the implied understanding that the party receiving it should, at all times, demean himself in a proper manner; and if not reflecting honor on the court appointing him, by his professional conduct, he would at least abstain from such practices as could not fail to bring discredit upon himself and the courts. . . . An honorable high-toned lawyer will always aid a deserving party seeking a divorce, as coming strictly within his professional duties. He will render the aid, not solicit the case; and he will, in all things regarding it, act the man, and respect, not only his own professional reputation, but the character of the courts, and discharge the unpleasant duty in all respects as an honorable attorney and counselor should do."

An attorney or counsel may be disbarred if he had been guilty of an act of immorality or impropriety inconsistent with the character or incompatible with the faithful discharge of the duties of his profession, or any other good cause.

In the beginning it may be well to note that counsel, ³⁰⁸ as well as attorneys, are liable to this rule; and the distinction which obtained between attorneys, counsel, and barristers, under the English or common law, does not prevail in Tennessee, at least as to the right to compensation for services; and our institutions and form of government do not tolerate or recognize the distinctions under the English government.

The other matter which we desire to call attention to is that attorneys and counsel are by the statute denominated

“professional,” and not “business,” men. The courts have never laid down any specifications of what constitutes an immorality or impropriety inconsistent with the character or incompatible with the faithful discharge of the duties of the legal profession. It is probable that such an attempt will never be made, since it would be impracticable to cover all cases that may arise in any enumeration that may be made.

We come, then, to the direct question whether the facts and conduct of complainants in this case bring them under the ban of the statute, or in violation of any proper rule of action in the court which would call upon the court to deny them relief for their fees.

It is evident that there may be many cases of immorality and impropriety on the part of attorney or counsel which would constrain the court to deny them relief for fees, which might not be considered sufficient to disbar the attorney or counsel from practice. We need not enlarge upon this, as it is too plain for question. Now, the present case is simply this: There had been a terrible ^{and} disaster in the defendant's mine, caused by an explosion, and hundreds of men had been suddenly killed, and numbers of women made widows, or childless, and numbers of children made fatherless. It was such a terrible catastrophe as to shock the community and arouse universal regret and horror. We may grant that a right of action accrued to the next of kin of every person killed and to every person injured.

The complainants, through their special partner, Chandler, went at once to the scene of the disaster, and personally solicited such parties as had rights of action to put their claims into complainants' hands. Under the facts, the firm, and each member, was a party to this personal solicitation.

It seems that other attorneys reached the scene of disaster before the complainants; and as the court of chancery appeals state, Chandler “entered actively into the competition for business, that he boldly and openly saw widows and others whose husbands and next of kin had been killed in the explosion, and sought, as other lawyers were doing, to have them intrust the bringing and prosecution of suits to his firm, but that it does not appear that he practiced any fraud or deception, or made any false representations to get cases for his firm. He made several trips to Coal Creek on this business, at the expense of the firm. He secured some forty cases, and one hundred and fifty or more cases were secured by other

lawyers, all in a few days. The cases were to be prosecuted on a contingent fee of so much per cent, ³¹⁰ and of this Chandler was to have a certain proportion. Suits were brought, and compromised afterward, as has already been set out. There can be no doubt of plaintiff's right to recover, unless they are denied relief on the ground of unprofessional conduct which the court deems sufficient to repel them."

We are of opinion that, under the facts disclosed by the finding of the court of chancery appeals, complainants are not entitled to recover, because these facts show acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties.

We cannot agree to several propositions advanced by complainants. We cannot agree that in these latter years a spirit of commercialism has lowered the standard of the legal profession. We cannot agree that the practice of law has become a "business" instead of a "profession," and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitations, under the facts shown in this case.

As to how far an attorney may go in soliciting business, or whether he may solicit at all, we are not called upon to decide; but when such a case is presented as is disclosed in this record, of attorneys rushing to the scene of disaster in hot haste, and competing with each other in soliciting the bereaved ones to allow them to sue for their losses, we feel that we are called upon to say in no uncertain terms that such conduct is an act of impropriety ³¹¹ and inconsistent with the character of the profession. We cannot, we dare not, lower the standard of the legal profession to that of a mere business, in which fleetness of foot or the celerity of the automobile determines who shall be employed.

The miserable victims of the disaster are dazed by the terrible bereavement. They are in no condition to consider their rights to damages. In their extremity, they fly to anyone promising relief, when, if left to time and more mature consideration, they would be enabled to make, perhaps, a better choice. In addition, it is unbecoming a member of the profession, and a public scandal, and when he bases his right to recover fees upon such improper conduct, and lowering the character of the profession and the court, it is no excuse that other attorneys do the same; but this is rather a reason why

this court should act promptly and decidedly, in order that an end may be put to the practice.

It is no excuse that corporations which have caused such disasters have been alert to send their agents and representatives to the scene, with a view of forestalling suits and making favorable compromises. This court has never failed to condemn this practice in the strongest terms; and whenever a case has come before it which in any way smacked of fraud or undue advantage arising out of such conduct, this court has not been slow to disregard or set aside improper or hard settlements. But such agents of corporations are not, as a rule, officers of the court, nor do they occupy that high status which the ³¹² law places the attorney upon; and we think that we can safely say that if any attorney should make such settlement under such circumstances, this court would not hesitate to disbar him.

It is said that there is no precedent for refusing fees because of such conduct. If this be so, we are admonished by the record in this case that it is high time that such a precedent be set, and in such terms as may not be mistaken or misunderstood.

The argument made in this case, that such practice is not looked upon with disfavor by many members of the profession, that it is freely indulged in by prominent attorneys, that it is necessary to successful practice, and that the court of appeals, while deprecating the practice, does not condemn it—these and other arguments call for a full and emphatic expression from this court in this case.

It is said that, even if this rule should prevail in considering questions of good faith and professional conduct between attorney and client, after the relation is established, it does not prevail in the making of the contract of employment, and that in making such contract, before the fiduciary relation has become established, the parties stand upon the same footing and as strangers to each other.

There is unquestionably a difference between the relations existing between attorney and client before and after employment, and in some respects, at the time and in the matter of a retainer of the lawyer's services, so ³¹³ that an attorney, after he is employed, will not be allowed to charge fees which he might have charged, when he was retained, if the same are excessive (*Rose v. Mynatt*, 7 Yerg. 30; *Phillips v.*

Overton, 4 Hayw. 291), but this principle does not reach the present controversy.

Here it is not the client alone who is concerned, but the court and the public; and the question is not narrowed down to the issue whether the client has been injured, but whether the conduct of the attorney has been contrary to the character of the profession, and opposed to a sound public policy and to the proper and decorous administration of the law.

As a matter of fact, the present suit does not concern these clients specially. They will not be benefited or burdened by it. They are interested in it in the same sense that the general public is interested, and not by their individual relation to it.

We are not now attempting to lay down the rule of good faith between lawyer and client, but the professional conduct of the attorney as he appears to the court and public in the practice of his profession. Nor are we attempting to lay down a rule of conduct for the agents of corporations in their efforts to effect compromises of damage suits. When a case, such as counsel depicts, arises, we will deal with it as we think the law and public policy demand.

Reference was made in the arguments and briefs of counsel to the record in the case of Lester. The facts in that case are not, upon the questions at issue, materially ³¹⁴ different from the case at bar, and the principles of law are the same. In that case Lester and his associates were denied fees, and as to that feature of the case there has been a finality in the decree of this court. The case is still pending upon the court's motion to disbar him.

But there are two distinct features in the Lester case—one to deny him fees, as in the present case; and the other to disbar him. In the present case, no disbarment proceedings have been brought, and we are not called upon to pass upon that question. In the Lester case, the defendant pleads in extenuation of his action his youth and inexperience, and the example of older and more prominent members of the profession, as well as his impaired physical condition; and these are matters which address themselves to the consideration of the court in proceedings for disbarment, but they are not matters which would move the court to allow the collection of fees by the party in fault.

For the reasons stated, we are of opinion that the complainants are not entitled to recover, and the decree of the

court of chancery appeals is reversed, and complainants' suit dismissed; and they will pay all costs.

WHEN IS AN ATTORNEY'S CONTRACT OF EMPLOYMENT VOID AS AGAINST PUBLIC POLICY BECAUSE SECURED BY SOLICITATION.

- I. Introductory, 1035.**
- II. When Solicitation is by the Attorney Himself, 1036.**
- III. When Solicitation is by Third Person at Request of Attorney, 1040.**
- IV. Soliciting by Advertising, 1041.**

I. Introductory.

As the peculiar conditions of society in England which gave rise to the doctrine of champerty do not exist in this country, the common-law rule regarding that doctrine has been repudiated by nearly all of the states for the reason, as was said in *Duke v. Hooper*, 2 Mo. App. 10, it is "a relic of a state of things long since passed away." In view of this fact, and the further fact that it has been the uniform tendency of our courts to allow great liberty of contracting between attorney and client, and to uphold agreements for contingent fees, the question to be discussed in this note is important, particularly so because the principal case not only revives the old English doctrine, but introduces a new and unique cause for declaring a contract between attorney and client void because contrary to public policy. True, there have been many adjudications in the different states as to what contracts between attorney and client are void as contrary to public policy, and this subject will be found fully discussed in the note attached to *Bowman v. Phillips*, 13 Am. St. Rep. 297. But in those cases the determination of the question hinged upon whether the subject matter of the contract was objectionable, as, for example, contracts in restraint of trade, or contracts interfering with the proper enforcement of law. Contracts of this character are not to be discussed in this note. The only question now under consideration is, whether the mere solicitation of business by an attorney, or by some one for him by his consent, vitiates his contract of employment on the ground that the circumstances under which the employment was secured is contrary to public policy. Additional importance is attached to consideration of this question because courts are loath to vitiate a contract as being against public policy for the reason, as stated by Mr. Story: "Public policy is in its nature so uncertain and fluctuating, varying with habits and fashions of the day, with the growth of commerce and usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud." And in *Chappel v. Brockway*, 21 Wend. 157, the learned judge after quoting the language of Burrough, J., protesting against arguing too strongly upon public policy, "it is a very

unruly horse, and when once you get astride it you never know where it will carry you—it may lead you from the sound law," added: "There is force in this remark."

II. When Solicitation is by the Attorney Himself.

The policy of soliciting business has been followed by many prominent members of the profession for years, and not only has the legal right of those so doing to enforce contracts for their fees not been denied by the courts, but the impropriety of their action has not been generally condemned by the profession. True, the solicitation of business by attorneys is often criticised by leading members of the bar, as being beneath the dignity of the profession, but except when deception was practiced, there has been no concerted action of the bar in censuring the practice. For this reason, and for the further reason that few clients have contested the right of their attorney to enforce contracts thus secured, the case of *Ingersoll v. Coal Creek Co.*, 117 Tenn. 263, ante, p. 1003, 98 S. W. 178, 9 L. R. A., N. S., 282, stands practically alone, and deserves to be noticed at length. In this case a well-known firm of attorneys, of many years' practice and high standing, agreed with a younger attorney to give him a certain percentage of their fees on all business which he might bring to their firm. Beyond this agreement there appears to have been no contract of partnership between the parties, though the young attorney thereafter made his office with the firm. Subsequently to the agreement just mentioned an explosion occurred in a coal mine, killing a great many of those engaged in its operation. The young attorney at once visited the scene of the disaster to solicit cases for the firm. He found that other attorneys had preceded him and were engaged in seeking employment. He entered into "competition" with the others and by means of personal solicitation among the widows and relatives of those who had been killed, he secured employment for his firm to prosecute a large number of damage suits against the owners of the mine. No fraud or deception of any kind was practiced by him in securing these cases, nor did he make any false representations to induce the employment. The contracts he obtained provided that the firm was to receive as their compensation for prosecuting the suits a certain percentage of the recovery, but it does not appear that the firm was to bear any expense of the litigation; nor was it contended that the contingent fee provided for was excessive. While the suits were pending the mining company effected a settlement with the plaintiffs without the consent of their attorneys of record, and these attorneys brought suit upon their contracts against the mining company to compel payment of their fees as specified. The defendant contended that their contract of employment was void as being against public policy. In sustaining this defense the court said: "It is insisted that the contracts made are not illegal. This, we think, does not reach the root of the case, as the contracts themselves, abstractly

considered, may be legal, and yet there may be circumstances surrounding their making which would deter the courts from enforcing them, or rights based on them, when all the facts are divulged and the nature of the consideration appears. . . . The present case is simply this: there had been a terrible disaster in the defendant's mine, caused by an explosion, and hundreds of men had been suddenly killed, and numbers of women made widows, or childless, and numbers of children made fatherless. It was such a terrible catastrophe as to shock the community and arouse universal regret and horror. We may grant that a right of action accrued to the next of kin of every person killed and to every person injured. The complainants, through their special partner, Chandler, went at once to the scene of the disaster, and personally solicited such parties as had rights of action to put their claims into complainant's hands. Under the facts, the firm, and each member, was a party to this personal solicitation. It seems that other attorneys reached the scene of the disaster before the complainants; and, as the court of chancery appeals state, Chandler entered actively into competition for business, he boldly and openly saw widows and others whose husbands and next of kin had been killed in the explosion, and sought, as other lawyers were doing, to have them intrust the bringing and prosecution of suits to his firm, but that it does not appear that he practiced any fraud or deception, or made any false representations to get cases for his firm. He made several trips to Coal creek on this business, at the expense of the firm. He secured some forty cases, and one hundred and fifty or more cases were secured by other lawyers, all in a few days. The cases were to be prosecuted on a contingent fee of so much per cent, and of this Chandler was to have a certain proportion. Suits were brought, and compromised afterward, as has already been set out. There can be no doubt of plaintiffs' right to recover, unless they are denied relief on the ground of unprofessional conduct which the court deems sufficient to repel them. We are of opinion that, under the facts disclosed by the finding of the court of chancery appeals, complainants are not entitled to recover, because these facts show acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties. . . . We cannot agree that in these latter years a spirit of commercialism has lowered the standard of the legal profession. We cannot agree that the practice of law has become a 'business,' instead of a 'profession,' and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitation, under the facts shown in this case. As to how far an attorney may go in soliciting business, or whether he may solicit at all, we are not called upon to decide, but when such a case is presented as is disclosed in this record, of attorneys rushing to the scene of the disaster in hot haste, and competing with each other in soliciting the bereaved ones to allow them to sue for their losses, we feel that we are called upon to say, in no un-

certain terms, that such conduct is an act of impropriety, and inconsistent with the character of the profession. We cannot, we dare not, lower the standard of the legal profession to that of a mere business, in which fleetness of foot, or the celerity of the automobile, determines who shall be employed. The miserable victims of the disaster are dazed by their terrible bereavement. They are in no condition to consider their rights to damages. In their extremity, they fly to anyone promising relief, when, if left to time and more mature consideration, they would be enabled to make, perhaps, a better choice. In addition, it is unbecoming a member of the profession, and a public scandal, and when he bases his right to recover fees upon such improper conduct, and lowering the character of the profession and of the court, it is no excuse that other attorneys do the same; but this is rather a reason why this court should act promptly and decidedly, in order that an end may be put to the practice. . . . It is said there is no precedent for refusing fees because of such conduct. If this be so, we are admonished by the record in this case that it is high time that such a precedent be set, and in such terms as may not be mistaken or misunderstood." In reply to the suggestion that the rule with reference to questions of good faith and professional conduct between attorneys and clients after the relation is established does not prevail in making the contract of employment, because until the fiduciary relation is established the parties stand on the same footing as strangers to each other, the court continued: "Here it is not the client alone who is concerned, but the court and the public; and the question is not narrowed down to the issue whether the client has been injured, but whether the conduct of the attorney has been contrary to the character of the profession, and opposed to a sound public policy and to the proper and decorous administration of the law."

It is important to note that the Tennessee statute prescribing the standard of professional conduct does not prohibit the personal solicitation of business by attorney; and this was admitted by the court. When personal solicitation is made by attorney in cases like the above, it is generally made immediately after the injury is sustained and before agents of the corporation can use their powers to effect a settlement. The acts of impropriety, therefore, which called forth the above language of the court did not differ in any material respect from the practice which has been resorted to for many years by many, some of whom, at least, are honored by the profession. It may be said, therefore, that the above case introduces a new ground, and establishes a novel doctrine on the subject of contracts against public policy.

We have a general feeling, as doubtless did the court determining the cause, that it was one calling for the action taken, and yet in which it is difficult to formulate the precise legal principle upon which such action must rest for its justification. That in similar

cases there is much danger that like action on the part of other counsel will lead to undue fomenting of litigation and to entering into harsh and improvident contracts, as well as an undue scramble for business, cannot be doubted, but we do not understand the judgment of the court to rest upon either of these grounds, nor upon all combined. It must, therefore, if sustainable, be sustained upon the suggestion made by the court, that the victims of such and of any similar disaster while dazed by their bereavement, and, as it were, in the immediate presence of their sacred sorrows (that presence being of itself more than enough to wholly occupy and paralyze their mental faculties), are in no condition to consider their business affairs, and should therefore be at liberty to take such action as in future shall seem best, when they have had time for reflection and their faculties have so far recovered from the shock as to make such reflection possible.

There is but one other case which has come to our knowledge where this question seems to have been considered. Unfortunately, no full statement of the facts is given in the decision, but it may be inferred that the court was of opinion that the personal solicitation of employment by an attorney would render his contract barratrous. The case to which we refer is *Missouri K. & T. Ry. Co. v. Bacon* (Tex. Civ. App.), 80 S. W. 572. This was an action for damages against the railway company for personal injuries. One H. H. Cummings was attorney for the plaintiff. He was to receive one-third of the amount recovered for his services in prosecuting the suit, and the plaintiff had assigned to him this interest in "any and all sums of money that might be obtained from the railway company"; but how soon after the accident the contract of employment was made does not appear. Pending the suit the railway company compromised with the plaintiff without the consent of his attorney, and he intervened in the action and prayed judgment against the company for his one-third interest under the contract. The defendant company evidently attacked the contract as barratrous, for the charge to the jury was as follows: "If you believe from the evidence that said Cummings, by personal solicitation, sought or obtained employment from said Bacon to institute said suit, or that before such employment the said Cummings, directly or indirectly, gave to said Bacon any money, or loaned or promised to give, loan or advance any money to said Bacon, then in any of these events you will find for the defendant, Missouri K. & T. Ry. Co. of Texas. In this connection, however, you are further instructed that if you find and believe from the evidence that said H. H. Cummings did not seek or obtain said employment by personal solicitation, and you further find that said Cummings loaned and promised to loan and advance money to said Bacon, but if you do not believe from the evidence that such lending or promising to lend or advance money, if any, by the said Cummings, was to induce his employment by said Bacon to institute

suit against defendant railway company, then such lending or promising to lend or advance money, if any, by said Cummings to said Bacon would not be unlawful, and would not affect the validity of his contract with said Bacon." Said the appellate court: "We think that the charge fully and fairly presented the law of barratry as applicable to the facts." It may be that the defense in this action was based on the contention that Cummings paid, or promised to pay, money to the plaintiff to procure his employment, rather than a mere solicitation by him to prosecute the suit. The language used in the charge, however, makes the case worthy to be noted, in the absence of further information regarding the facts.

III. When Employment is Procured Through Solicitation of a Third Party not an Attorney.

There are several cases which hold that a contract of employment procured by an attorney through the solicitation of a third party who is not an attorney, upon an agreement by which such third party is to receive a portion of the fee charged, is contrary to public policy and void. These cases go no further, however, than to decide that the contracts as to the division of the fee with each third party are void, but do not decide that the attorney cannot enforce the contract as against the client. These cases are decided upon the principle that an attorney who contracts to divide his fee with one who is not an attorney, is practically allowing the use of his name and professional privileges to one not entitled thereto. Thus in *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483, the attorneys agreed to give one Bolte, who was not an attorney, a certain portion of the fee he obtained in cases procured for them by said Bolte. In an action by Bolte's assignee to recover under said agreement the court said: "Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted [the statutory enactment prohibiting an attorney from lending his name to be used by one not an attorney]. Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors at law for his benefit, and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted attorney. He is thus enabled, through their agency, vicariously, and not openly and in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. An attorney is prohibited to allow the direct use of his name as an attorney and counselor at law under the circumstances disclosed by the complaint

in this case. Of what avail is such prohibition, if it can be, by such indirection as is practiced in this case, evaded? We are of opinion that the facts here disclose a case of indirect violation of the clause referred to, which is as much forbidden as a direct violation. If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such a position, and possessing none of the qualifications which the law demands and requires. Such a practice would tend to increase the amounts demanded for professional services. In such a case, an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person." To the same effect is the case of *Langdon v. Conlin*, 67 Neb. 243, 108 Am. St. Rep. 643, 93 N. W. 389, 60 L. R. A. 429.

In New York the statute expressly prohibits any attorney from giving, or promising to give, a valuable consideration to any person for placing in his hands a demand of any kind for the purpose of bringing an action thereon, and hence in *Re Clark*, 184 N. Y. 222, 77 N. E. 1, an attorney was disbarred for paying a third person a part of his fee for procuring cases for him. But the rule announced in the above cases is not universal, for in *Vocke v. Peters*, 58 Ill. App. 338, it was held that an agreement by an attorney to pay a commission for business brought to him is not contrary to public policy; and a similar doctrine is stated in *Candler v. Candler*, Cro. Jac. 225, 6 Madd. 141.

IV. Soliciting by Advertising.

It cannot be said that advertising for business by an attorney has been condemned by the courts, except when the advertisements were misleading. Those advertisements which have been held to be of this character and to subject their authors to disbarment are used by that class of attorneys who specially seek to procure divorce cases. In *People v. Goodrich*, 79 Ill. 148, an attorney was disbarred for advertising as follows: "Divorces legally obtained for incompatibility, etc. Residence unnecessary. Fee after decree. Address P. O. box 1037. Chicago, Ill." Said the court: "Such advertisements should stigmatize their authors with enduring shame and contumely. These advertisements are not only a libel upon the courts of justice of this state, but are false in themselves, and put forth to the public by one who would not put his name to them. No high-minded, honorable member of our noble profession, in this or any other state, so degrades himself, nor does any member of it, jealous of his own honor, and duly appreciating his relations to the profession and to the courts, so conduct." A similar doctrine is found in *People v. McCabe*, 18 Colo. 186, 36 Am. St. Rep. 270, 32 Pac. 280, 19 L. R. A. 231, and *People v. Taylor*, 32 Colo. 250, 75 Pac. 914.

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ACTIONS.

1. **ACTIONS**—Splitting Cause of.—If an officer has disposed of a portion of personal property alleged to have been wrongfully seized by him under a writ of attachment, the owner may maintain an action in trover and conversion for the goods thus disposed of, and an action in replevin for the remainder. (Mont.) *Gehlert v. Quinn*, 864.

2. **JUDGMENT, Merger by**—Splitting of Causes of Action, What is not.—The giving of a promissory note for a part of a sum due for materials sold and delivered, and the subsequent taking of judgment for the amount of such note, do not, where there is evidence that the note was taken in payment of the account, preclude the plaintiff from afterward maintaining an action for the balance due. The cause of action accruing at the maturity of the note is not the same as that resting on the balance of the account, and recovery therefor may be had without splitting the cause of action. (Ala.) *Ebersole v. Daniel*, 52.

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ADVERSE POSSESSION.

1. **LIMITATIONS OF ACTIONS to Recover Property Purchased at Tax Sales**.—Under the statutes of Colorado no action can be maintained for the recovery of land which has been sold for taxes, unless brought within five years after the execution and delivery of the tax deed as against one who has been in possession during the full period of five years from the recording of such deed. (Colo.) *Wood v. McCombe*, 269.

2. **ADVERSE Constructive Possession**.—A person who takes actual possession of one of two adjoining tracts of land under a deed conveying both does not acquire constructive possession of the other, if the actual title to the two is in different persons. (Ark.) *St. Louis etc. Ry. Co. v. Moore*, 142.

3. **ADVERSE POSSESSION of Mineral Rights**.—If an owner of land conveys an undivided one-half interest in a coal mine, this operates as a severance, by grant, of the coal from the land over-

lying it, and, thereafter, the mere possession of the surface does not carry with it, or extend such possession to, the coal, and the grantee, as holder of the paper title to the coal sued for, is entitled to recover it, unless the defendant and those under whom he claims title have been in the actual, open, notorious, exclusive, adverse and hostile possession of the coal mine as such, independent of the possession of the surface for more than ten years before the institution of the suit. (Mo.) *Gordon v. Park*, 802.

4. **ADVERSE POSSESSION of Mineral Rights.**—Coal in place is land when severed by grant from the surface, and an action in ejectment therefor is barred in ten years only when the possession has been actual, adverse, open, hostile, exclusive and continuous. (Mo.) *Gordon v. Park*, 802.

5. **ADVERSE POSSESSION of Mineral Rights.**—It is not necessary that the surface owner's adverse possession of a coal mine, severed by grant from the surface, be a bar to the owner's legal title, that work in the mine should have been done every day or within the view of the public for the requisite period of the statute of limitations; but it is necessary that such surface owner should have continued to exercise acts of possession and ownership over it, as by keeping off trespassers, giving permission to persons to take coal therefrom, paying taxes thereon, mining the coal when practicable or advantageous, or leasing the mine to others, from all of which the owner of the legal title must have known or inferred that the surface owner was claiming the coal as his own. (Mo.) *Gordon v. Park*, 802.

See Waters and Watercourses, 1.

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AGENCY.

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ANIMALS.

1. **DOGS—Liability for Malicious Killing.**—The owner of a dog may maintain an action against a railway company whose employé in operating a street-car wantonly and maliciously runs down and kills the animal. (Ga.) *Columbus R. R. Co. v. Woolfolk*, 404.

2. **DOGS—Evidence of Value.**—In an Action to recover for wrongfully killing a dog, the value of the animal may be proved by evidence of his breed, qualities, and market value. (Ga.) *Columbus R. R. Co. v. Woolfolk*, 404.

See Constitutional Law, 1.

APPEAL AND ERROR.

In General.

1. **APPEAL.**—The Cause must be Heard upon Appeal upon the same theory upon which it was tried in the lower court. (Mo.) *Gordon v. Park*, 802.

2. **APPEAL AND ERROR—Decree Canceling Power of Attorney, When not Error.**—A decree that a certain power of attorney authorizing an action to be brought for the lands in controversy be set aside, and held of no effect, will not be reversed on the ground that such power embraces lands other than those in controversy. (Mo.) *Priddy v. Boice*, 762.

3. **APPEAL.**—Striking Out of Pleadings after the testimony is closed is within the discretion of the trial court, and if without prejudice, its action will not be disturbed on appeal. (Iowa) Hall v. Kary, 639.

4. **APPEAL.**—When the Court of Appeals Certifies to the supreme court a constitutional question, a decision of which it finds necessary to a proper determination of the case, the supreme court will not undertake to determine whether the court of appeals has properly decided that a determination of such question is necessary. (Ga.) Harvey v. Thompson, 373.

5. **APPEAL AND ERROR.**—Jurisdiction.—Disposition of Cause.—The supreme court has power to interpret the legal effect of a stipulation on file, and to declare as fully paid a judgment brought up by writ of error, and which has been released as to a portion of the joint judgment debtors by such stipulation. (Colo.) Ducey v. Patterson, 284.

6. **APPEAL.**—Waiver of Objections.—A motion to dismiss a petition in error on account of an omission to file a motion for a new trial in the trial court is a waiver of any objection to the sufficiency of the summons in error. (Neb.) State v. Shrader, 913.

7. **APPEAL.**—Omission to File Motion for New Trial in the lower court is not fatal to appellate jurisdiction. (Neb.) State v. Shrader, 913.

8. **APPEAL.**—Disposition of Equity Cases.—Under a statute authorizing and requiring the supreme court in equity cases to review all questions of fact arising upon the evidence and determine them, as well as all questions of law, the court may, in a case wherein the title to a water right is sought to be quieted and defendant enjoined from further interference therewith, pass without examination the alleged errors, and dispose of the appeal upon its merits under an examination of the evidence alone. (Mont.) Pew v. Johnson, 852.

Exceptions and Assignments of Error.

9. **APPEAL AND ERROR.**—An assignment that the court erred in its decree overruling the demurrer of the respondents and a motion to strike out parts of the complaint is too general. (Ala.) Reynolds v. Lawrence, 78.

10. **APPEAL.**—Several Exceptions to Overruling of Demurrer.—Where defendants "each separately and severally demurs" to the complaint, an entry that the court "overrules the separate demurrer by each of the defendants to the complaint, to which ruling the defendants except," shows a several and not a joint exception by them. (Ind.) Whitesell v. Strickler, 524.

11. **APPEAL.**—A Joint Assignment of Error must, to be sufficient, be founded upon a ruling against all, and erroneous as to all; likewise a separate assignment, founded upon a joint ruling against one or more appellants, presents no question to the appellate court. (Ind.) Whitesell v. Strickler, 524.

12. **APPEAL.**—A Strict Construction of the Rules of procedure is usually indulged in identifying the question appealed, but where several parties for convenience unite in one paper, the exceptions to the ruling of the court thereon should be construed liberally with a view of according an appropriate exception to each exceptor. (Ind.) Whitesell v. Strickler, 524.

13. **APPEAL.**—Error in Rulings on Admission of Evidence, not pointed out by counsel will not be reviewed on appeal. (Iowa) Hall v. Kary, 639.

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13. **APPEAL.**—Error in Rulings on Admission of Evidence, not pointed out by counsel will not be reviewed on appeal. (Iowa) Hall v. Kary, 639.

14. APPEAL AND ERROR—Matters not Called to the Attention of the Lower Court.—The respondents are not entitled to the reversal of a cause or the restatement of an account in an appellate court where they have not appealed, and the attention of the trial court was in no manner directed to what is claimed in the appellate court to constitute error in the settlement of an account. (Mo.) *In re Switzer*, 731.

Transcript and Abstract.

15. APPEAL—Filing of Transcript—Trial De Novo.—To authorize the appellate court to consider a case de novo, the statute, as it stood when this appeal was taken, required the certified transcript of the evidence to be made and filed within six months from the date of the judgment appealed from. (Iowa) *Smith v. Smith*, 581.

16. APPEAL—Preparation of Transcript.—If a Party Postpones or neglects to take his appeal and to order his transcript until so near the expiration of the period allowed by law that it is physically impossible to complete the record in time, he does so at his peril, and the trial court may rightfully decline to enter an order which it knows the reporter, in the exercise of reasonable diligence, cannot comply with. (Iowa) *Smith v. Smith*, 581.

17. APPEAL AND ERROR.—Where the Abstract on Appeal Fails to Show That an Objection was Made to Evidence and an Exception Reserved to its admission, any supposed error in admitting it cannot be considered on appeal. (Mo.) *Priddy v. Boice*, 762.

18. APPEAL AND ERROR—Abstract Failing to Show the Error Complained of.—If an appeal is by what is known as the short method, and the point made in the briefs is that the court erred in excluding competent evidence, the supposed error cannot be considered where it is not supported by the abstract. (Mo.) *Priddy v. Boice*, 762.

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19. APPEAL AND ERROR.—A Person not a Party to the Record may be Entitled to Appeal where the statute gives the right of appeal to certain enumerated persons "or other person having an interest in the estate under administration." (Mo.) *In re Switzer*, 731.

20. APPEAL AND ERROR—Right of a Guardian to Appeal from an Order Settling His Accounts.—Where a statute declares that the right of appeal in cases involving the administration of estates shall extend to any heir, devisee, or creditor or other person having an interest in the estate under administration, the sureties of a guardian may appeal from an order settling his accounts and fixing his liability to his ward. (Mo.) *In re Switzer*, 731.

21. JUDGMENTS, Sureties upon Official Bonds, When Parties to. The sureties on the official bond of a guardian are to be deemed parties to the record of a judgment against their principal, and may hence appeal therefrom. (Mo.) *In re Switzer*, 731.

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22. APPEAL AND ERROR—Review of Interlocutory Decree.—Under the code of Alabama an appeal lies to the supreme court from a decree overruling a plea to a bill, or, what is the same thing, holding it to be insufficient. In this way a judgment of the higher court may be obtained in advance of the taking of evidence or a hearing upon the merits. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

23. APPEAL AND ERROR.—A motion to strike out parts of the complaint is addressed to the sound discretion of the court, and the

refusal to grant it is not reversible. (Ala.) *Reynolds v. Lawrence*, 78.

24. **APPEAL—Motion for Nonsuit—Review.**—The action of the trial court upon a motion for a nonsuit is not reviewable on appeal. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

25. **APPEAL AND ERROR—Construction of Statutes Giving a Right of Appeal.**—Where it is apparent that persons seeking a right of appeal have a substantial interest in the subject matter of a controversy, the court should not hesitate to hold that they have a right of appeal, if, by a fair and reasonable interpretation of the statute, they can be brought within its provisions. (Mo.) *In re Switzer*, 731.

26. **APPEAL—Matters not Reviewable.**—If the moving papers upon which an application to vacate a default were made in the lower court are not embraced in the bill of exceptions, the appellate court cannot review the ruling made thereon. (Mont.) *Ross v. Northern Pac. Ry. Co.*, 836.

27. **APPEAL—Objectional Remark of Court.**—If the record fails to show that counsel objected or excepted to an objectionable remark of the trial court, an assignment of error thereon cannot be reviewed on appeal. (Mont.) *Gehlert v. Quinn*, 864.

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ASSIGNMENTS.

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ATTACHMENT.

1. **ATTACHMENT—Several Writs of Attachment may Issue Upon a Single Affidavit or Undertaking.**—Hence a writ is not invalid because the affidavit showing proper cause for an attachment had been filed two days before the writ issued. (Cal.) *Martinovich v. Marsicano*, 254.

2. **ATTACHMENT, Issuing Writs of at Different Times.**—The several writs of attachment to which the plaintiff is entitled on the filing of his affidavit and undertaking need not all issue at the same time. Therefore, though a writ is issued on a proper affidavit and undertaking, other writs may subsequently issue based thereon. (Cal.) *Martinovich v. Marsicano*, 254.

3. **ATTACHMENT, Collateral Attack Upon Because Issued Too Long After the Filing of an Affidavit and Undertaking.**—If an attachment is issued some days after the filing of an affidavit therefor, the only remedy of the defendant is by motion to set the writ aside. He cannot on account of such intermission avoid the effect of a judgment subsequently entered in the attachment, nor prevent the sale thereunder from relating back to the levy of that writ. (Cal.) *Martinovich v. Marsicano*, 254.

4. **ESTATES OF DECEDENTS—Decree of Distribution, Effect of on Attachments.**—If an attachment is levied on the interest of an

heir in real property, who subsequently conveys to a third person, to whom the property is distributed by the final decree of distribution, this does not affect the rights acquired by the levy of the writ nor constitute any defense to an action to recover the property, bought by the purchaser at an execution sale whose title relates back to and takes effect from the levy of the attachment. (Cal.) *Martinovich v. Marsicano*, 254.

5. **SHERIFF, Authority of Beyond the County—Attachment.**—The sheriff of one county has no authority to levy an attachment and seize property thereunder situate in another county, and on motion, the levy should be discharged. (Ala.) *Jones v. Baxter*, 54.

6. **FORTHCOMING BOND, When not Enforceable.**—If the levy of an attachment is void because made by the sheriff of a county other than that in which he finds the property, the execution of a forthcoming bond to get possession of the property taken from him under the void levy does not validate it, nor prevent him from obtaining relief by making a motion to have the levy discharged as void. (Ala.) *Jones v. Baxter*, 54.

7. **RAILROADS—Attachment of Car from Another State—Contract Right Superior to.**—If a railroad company in one state receives a car from a company in another state under a contract of hiring, giving the former company the right to carry the car to its destination within the state, unload it, and then reload it, and return it in the same general direction to the owner beyond the limits of the state, the right of the hiring company to the use of the car is superior to the right of an attaching creditor of the owner, who seeks to subject the car to attachment, by service of summons or garnishment upon the hiring company. (Ga.) *Southern Flour etc. Co. v. Northern Pac. Ry. Co.*, 356.

8. **RAILROADS—Attachment of Car from Another State—Interstate Commerce.**—If a railroad company in one state receives a car from a company in another state under a contract of hiring, giving the former company the right to carry the car to its destination within the state, unload it, and then reload it, and return it in the same general direction to the owner, beyond the limits of the state, such car, while in the state, is not exempt from attachment for a debt of the owner, sought to be executed by service of summons or garnishment upon the hiring company, upon the sole ground that such impounding of the car is an unlawful interference with interstate commerce. (Ga.) *Southern Flour etc. Co. v. Northern Pacific Ry. Co.*, 356.

9. **RAILROADS—Attachment of Cars—Interstate Commerce.**—An unloaded car generally employed by a railroad company as part of its equipment in the transportation of freight from one state to another, is not exempt from the process of attachment regularly instituted for the collection of a debt, upon the ground that such impounding of the car is unlawful interference with interstate commerce. (Ga.) *Southern Flour etc. Co. v. Northern Pacific Ry. Co.*, 356.

ATTORNEY AND CLIENT.

1. **ATTORNEYS AT LAW, Liability of to Persons Participating in a Compromise of a Suit.**—If a corporation and sundry individuals are joined as defendants in a suit to recover by plaintiffs as attorneys at law on the ground that the defendants, having knowledge of the plaintiffs' employment, participated in a compromise and settlement of claims against such corporation without the consent of the plaintiffs, if the corporation is held liable, then must such other defend-

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ants be individually and personally liable with it. (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

2. **ATTORNEYS AT LAW, Right to Defend Action on the Ground of Their Misconduct in Procuring Employment.**—Where a corporation and other defendants are sued by a firm of attorneys on the ground that the defendants procured a compromise and settlement of claims in suits in which the plaintiffs had an interest in the way of contingent fees, the defense may be made that the plaintiffs, in soliciting and procuring their employment to bring such suits, were guilty of such professional impropriety that the court will not entertain their action. (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

3. **ATTORNEYS AT LAW, General Power of Courts to Disbar.**—Attorneys at law being officers of the court, it has inherent power to keep its forum pure by removing therefrom all parties appearing therein whose practices and acts tend to make them impure or to impede, obstruct, or prevent the administration of the law, or destroy the confidence of the people in such administration. (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

4. **THE DISTINCTION Between Attorneys and Counsel** which obtained in the English common law does not prevail in Tennessee. (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

5. **ATTORNEYS AT LAW, Denying Relief to for Causes Which do not Require Disbarment.**—There may be many acts of immorality or impropriety on the part of an attorney or counsel which would not require the court to deny him relief for fees which might not be considered sufficient to require disbarment. (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

6. **ATTORNEYS AT LAW, Solicitation of Business Which is Against Public Policy and may Occasion the Denial of the Right to Recover Compensation.**—If after a terrible disaster in a mine, resulting in the killing of hundreds of persons, a member or representative of a firm of attorneys proceeds to the locality of the disaster and personally solicits parties having supposed rights of action against the mine owners to put their claims in the hands of such attorneys, and other attorneys enter the same field for the same purpose, and competition results in obtaining the business of prosecuting claims for judgment, and many cases are secured for the firm first entering the field for the prosecution of cases on a contingent fee or percentage, the attorneys so seeking such contracts are not entitled to recover for their services therein, because the facts disclose acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties. (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

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BANKRUPTCY.

1. JUDGMENT IN BANKRUPTCY—Conclusiveness—Collateral Attack.—A judgment in bankruptcy as to the title to property purchased in the course of such proceedings is conclusive and binding as to all persons and in every court, and cannot be collaterally attacked in another court by showing that such title was obtained by fraud, and was not, in reality, what the record declared it to be. (Mich.) *Preston v. Newcomb*, 691.

2. BANKRUPTCY, SALES IN—Persons Concluded by.—A creditor of a bankrupt, who was a party to the bankruptcy proceedings, recognized the validity thereof and the discharge of his claim, and took a note to revive it, after a sale in such proceedings, cannot attack the title of the purchaser at such sale. (Mich.) *Preston v. Newcomb*, 691.

3. BANKRUPTCY—Rights of Subsequent Creditors.—A creditor of a bankrupt, who becomes such after the conclusion of the bankruptcy proceedings, has no pre-existing right to be affected by an adjudication therein, and is not in a position to call it in question. (Mich.) *Preston v. Newcomb*, 691.

4. BANKRUPTCY, SALES IN—Title of Purchaser.—A person who proves a good title to property acquired by purchase at a sale in bankruptcy proceedings, and also shows by a written agreement that the bankrupt debtor held the property in recognition of his ownership, is entitled to the property, as against an attaching creditor of the debtor, until such showing is met by evidence to show that such purchaser parted with his title after he had acquired it. (Mich.) *Preston v. Newcomb*, 691.

See Fraudulent Conveyance, 4.

BANKS AND BANKING.*Banking in General.*

1. BANK, Liability of as Purchaser of a Bill or Draft Attached to a Bill of Lading.—The purchaser of a draft with a bill of lading attached is not a purchaser of the goods represented by such bill, so that the presentation of the draft for payment becomes a contract on the part of the purchaser to sell the goods to the drawee, when, as a matter of fact, the goods had already been sold by the drawer to the drawee, and as a matter of law, the bill of lading and the goods only passed as collateral security for the draft, which was the only thing the bank bought. (Tenn.) *L. Leonhardt & Co. v. W. H. Small & Co.*, 994.

2. BANKS.—The Purchase by a Bank of a Draft with a bill of lading attached representing goods shipped does not so vest the property in such goods in the purchasing bank that it becomes substituted to all the liabilities of the original drawer and the absolute owner of the property. It merely holds the bill as collateral security for the draft and is not a guarantor of the quantity or quality of the goods shipped under the bill of lading. (Tenn.) *L. Leonhardt & Co. v. W. H. Small & Co.*, 994.

3. BANKS, Effect of Indorsing Special Notice on Some Bills of Lading and Omitting It as to Others.—Where several drafts are drawn and there are attached thereto several bills of lading representing goods shipped, and on some of the drafts is a stamped statement that the bank notifies all concerned that it is not responsible either as principal or as agent for the quantity, quality or delivery of the goods

covered by the bills of lading, this does not show that a different rule must be applied where the statement is omitted from that where it is used. The indorsement by such stamping is surplusage. (Tenn.) *L. Leonhardt & Co. v. W. H. Small & Co.*, 994.

4. **NATIONAL BANKS, Contracts of, When Ultra Vires.**—If the sale of a draft is in effect a sale outright of the bill of lading attached thereto so as to amount to a sale of the goods represented by such bill, and the purchaser is a national bank, then the entire transaction is ultra vires, and no obligation arising therefrom can be enforced against the bank. (Tenn.) *L. Leonhardt & Co. v. W. H. Small & Co.*, 994.

Statutory Regulation of Banking.

5. **BANKING—Statutory Regulation.**—At the Common Law an individual could engage in the banking business at pleasure, but the state has power to regulate and restrain the exercise of that right. (Ind.) *State v. Richcreek*, 491.

6. **BANKING—Reasonableness of Statutory Regulations.**—The question as to what regulations of the banking business are proper and needful is primarily for the legislature to decide, but the courts, if called upon, must finally determine whether the regulations are in harmony with constitutional guaranties. (Ind.) *State v. Richcreek*, 491.

7. **BANKING—Constitutionality of Regulation.**—A statute providing that the "real estate, bank furniture and fixtures" of unincorporated banks shall not constitute more than one-third of their entire capital, does not deprive such banks of their property without due process of law, nor abridge their privileges and immunities in contravention of the fourteenth amendment. (Ind.) *State v. Richcreek*, 491.

8. **BANKING—Constitutionality of Regulation.**—A statute providing that no unincorporated bank shall do business unless it has property of the cash value of ten thousand dollars is constitutional. (Ind.) *State v. Richcreek*, 491.

9. **BANKING—Constitutionality of Regulation.**—A statutory provision that the proprietors of unincorporated banks shall take oath that their individual net worth is at least double the amount of capital paid into the bank is constitutional. (Ind.) *State v. Richcreek*, 491.

10. **BANKING—Constitutionality of Regulation.**—A statutory provision requiring an individual, or one member of a firm, conducting a banking business, to be a resident of the state, is constitutional. (Ind.) *State v. Richcreek*, 491.

BILL OF LADING.

See Carriers, 1.

BILLS AND NOTES.

In General.

1. **BILLS AND NOTES—Note Under Seal.**—To render a note a sealed instrument, it must be so recited in the body of the note, and the mere addition of a seal or a device, "L. S.," after the signature of the maker is insufficient. (Ga.) *Burkhalter v. Perry & Brown*, 343.

2. **BILLS AND NOTES.**—The Payee of a Bill of Exchange After Its Acceptance occupies to the acceptor the position of a bona fide purchaser, and therefore, between the payee and acceptor, no want,

failure or other defect of consideration existing between the debtor and the acceptor can be shown, and this remains true though the drawee has been induced to accept the bill by means of a fraud, such as attaching thereto a forged or fraudulently altered security or bill of lading. (Tenn.) *L. Leonhardt & Co. v. W. H. Small & Co.*, 994.

3. **BILLS AND NOTES—Mistake in Name of Payee.**—A plaintiff suing on a note purporting to be payable to another person, may show that he was the payee intended. (Ind.) *Digan v. Mandel*, 515.

4. **BILLS AND NOTES—Presumption of Delivery from Possession.**—Where the complaint in an action on a note alleges that, by mistake and inadvertence, the note was made payable to a bank, that the bank indorsed it to the payee intended, and that he indorsed it to the plaintiff, evidence that the maker's signature is genuine, that the intended payee had the note in his possession two or three years after its date, and that bank at all times disclaimed any title to the note, does not raise an inference of its delivery, when its execution is denied. (Ind.) *Digan v. Mandel*, 515.

Note Signed by Agent.

5. **PRINCIPAL AND AGENT—Note Signed by Agent Alone.**—If an agent signs a note with his own name alone, and there is nothing on its face to show that he is acting as agent, he is, and his principal is not, personally, liable on the note. (Ga.) *Burkhalter v. Perry & Brown*, 343.

6. **PRINCIPAL AND AGENT—Note by Agent as "Agent."**—If an agent makes a note in his own name, and adds to his signature the word "agent," and there is nothing in the note to indicate who is the principal, the agent is personally liable, just as if the word "agent" was not added. (Ga.) *Burkhalter v. Perry & Brown*, 343.

7. **PRINCIPAL AND AGENT—Note by Agent—Liability of Principal.**—If it appears from the face of a note that credit is not given to the agent who signs it, and the name of the principal is disclosed at the time of the transaction, though not stated in the paper, and the act is within the power of the agent, the principal is bound. (Ga.) *Burkhalter v. Perry & Brown*, 343.

8. **PRINCIPAL AND AGENT—Note by Agent—Parol Evidence to Charge Principal.**—If a negotiable instrument is executed by an agent without sufficiently indicating on its face who the principal is, parol evidence cannot be introduced to charge the principal, although the agent in executing the instrument added the word "agent" to his signature. (Ga.) *Burkhalter v. Perry & Brown*, 343.

9. **PRINCIPAL AND AGENT—Note by Agent—Parol Evidence to Charge Principal.**—As between the immediate parties to a bill or note, it may be shown by parol that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, though signed by him alone, and that it was given and accepted as such. (Ga.) *Burkhalter v. Perry & Brown*, 343.

10. **PRINCIPAL AND AGENT—Note Signed by Agent as "Agent"—Pleading.**—In a suit by the payee against the principal on a note signed by "B, agent," a petition alleging that such agent was duly authorized to sign the note for his principal, and that it was intended to charge such principal by the signature of the agent as "agent," states a good cause of action. (Ga.) *Burkhalter v. Perry & Brown*, 343.

Indorsers and Indorsement.

11. **BILLS AND NOTES—Indorsers in Blank.**—One who puts his name in blank on the back of a note, payable to the maker or order,

before it is negotiated, and before it is indorsed by the maker, is an indorser and not a joint maker, if, when negotiated, the maker's name appears first on the back of the note, and his liability cannot be varied by parol evidence. (Neb.) *Harnett v. Holdrege*, 905.

12. BILLS AND NOTES—Indorsers in Blank—Evidence to Vary Liability.—One who signs his name in blank on the back of a note, made payable to the order of the maker, which is afterward indorsed by the payee and delivered to a third person, is liable as an indorser and not as a joint maker, and parol evidence of a custom pursued by the maker with regard to other notes of the same kind is not admissible to show inferentially that such indorser was a joint maker. (Neb.) *Harnett v. Holdrege*, 905.

13. BILLS AND NOTES—Indorsers, Right of to have the Holder Accept Payment Before Note is Due.—If an accommodation note is indorsed to a bank, and a collateral agreement is at the same time entered into between it and the maker that he may make payment before the note is due and have a rebate of interest, and the maker subsequently seeks to avail himself of such agreement, the holder must accept payment though he knows the maker to be then insolvent, for, failing to accept, he would release the indorsers. (Tenn.) *Second National Bank v. Prewitt*, 987.

14. BILLS AND NOTES, Payment Before Bankruptcy, When does not Release Indorsers.—If the maker of a note tenders payment to the holder, who then knows the insolvency of the maker, but is under a contract to receive such payment, his duty as against indorsers is to accept payment, but, upon the maker's being declared a bankrupt, the duty of the payee is to surrender his preference and present his claim against the estate of the bankrupt, and on so doing, he is entitled to proceed against the indorsers who remain liable notwithstanding such payment. (Tenn.) *Second National Bank v. Prewitt*, 987.

15. BILLS AND NOTES, Indorsers, Extent of Release of by Failure of a Payee to Present His Claim Against a Bankrupt Maker.—If the maker of a note becomes insolvent and is adjudged a bankrupt, the payee should present his claim for allowance in the bankrupt's estate, and, failing to do so, the indorsers are released, but only to the extent to which they suffer because of such failure, and a recovery may be had against them for the amount which would have remained unpaid had the claim been presented in bankruptcy and a dividend been allowed and received thereon. (Tenn.) *Second National Bank v. Prewitt*, 987.

Actions on Note.

16. BILLS AND NOTES—Allegation of Ownership.—If the plaintiff in an action on a note is not the payee therein named, he must allege facts showing his title or right to maintain the action. This requirement is met by an averment that, by mistake and inadvertence in drafting, the note was made payable to a bank instead of the plaintiff. (Ind.) *Digan v. Mandel*, 515.

17. BILLS AND NOTES—Pleading—Variance.—In an action on a note the specific title alleged must be proved as laid. (Ind.) *Digan v. Mandel*, 515.

18. BILLS AND NOTES—Proof of Signature—Delivery.—When the execution of a note is denied, a delivery of the writing must be proved, as well as the signatures of the parties disputing its validity. (Ind.) *Digan v. Mandel*, 515.

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CARRIERS.

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1. A BILL OF LADING Written in Pencil is valid. (Ark.) *Main v. Jarrett*, 144.

2. THE LIMITATIONS of the Liability of a Carrier may Extend not only to risks of accident for which the carrier would be answerable, but to the amount of the damages for which it will be answerable in case of loss or injury, when the purpose appears to be to secure a just and reasonable proportion between the amount for which it is liable and the freight which it is to receive. (Ala.) *Southern Express Co. v. Owens*, 41.

3. CARRIERS—Damages—Stipulations Purporting to Fix the Value of Property, When not Binding.—A common carrier may not limit its liability for negligence by an agreed valuation upon the consideration of reduced charges for carrying a package, when such valuation is greatly less than the real value of the package, though the contents of the package or its value is not disclosed to the carrier. (Ala.) *Southern Express Co. v. Owens*, 41.

4. CARRIERS—Wrongful Delivery of Goods.—A carrier has no right to refuse to recognize the demand of the true owner of property, made while such property is in the carrier's possession and duly pressed, and carry it away and deliver it to a person who does not own it, or to his order, merely because the carrier received it from such person as consignor. By such act the carrier renders himself liable. (Ga.) *Georgia R. R. & B. Co. v. Haas*, 227.

5. CARRIERS—Right of Owner of Property to Reclaim It when Shipped by Another.—If one not the owner of property delivers it to a carrier for shipment, the true owner, who is not a party to the contract of shipment, may, while the property is in the possession of the carrier, demand and reclaim it, and, upon refusal, enforce his demand by suit. (Ga.) *Georgia R. R. & B. Co. v. Haas*, 227.

6. CARRIERS—Negligence—Burden of Proof.—In an action against a common carrier to recover for negligence in transporting perishable property in refrigerator-cars, the negligence alleged as consisting in a failure to properly ice the cars, the burden of proof is upon the plaintiff to show such negligence, and that the property was in good condition when delivered to the carrier. (Iowa) *Taft Company v. American Express Co.*, 642.

7. CARRIERS—Transportation of Perishable Property—Negligence.—If a common carrier undertakes to carry perishable commodi-

ties in refrigerator-cars, it should provide a supply of ice ample for the purpose, not only at the point of shipment, but also at such places along its lines, as will reasonably insure a safe transit to the point of destination, and failing to do this the carrier is guilty of negligence. (Iowa) Taft Company v. American Express Co., 642.

Of Passengers.

8. CARRIERS OF PASSENGERS, Negligence of, When Sufficiently Averred.—A count averring that the plaintiff was injured while a passenger upon defendant's railway, in a mode specified, and that these injuries were proximately caused by the negligence of defendant's servants in and about the carriage of the plaintiff as a passenger upon the railway of the defendant, is not open to objection because of the generality of the averment of negligence. (Ala.) Birmingham Ry. etc. Co. v. Adams, 27.

9. PLEADING—Negligence, Averment of Duty of the Plaintiff, When Unnecessary.—It is not necessary, in an action against a carrier of passengers, to specifically aver that the defendant owed a duty to the plaintiff not to injure him. When the gravamen of the action is the alleged negligence or misfeasance of another, it is sufficient, as a general rule, that the complaint allege the facts out of which the duty springs, and that the defendant negligently failed to do and conform them. (Ala.) Birmingham Ry. etc. Co. v. Adams, 27.

10. PLEADING—The Duties Incident to Carriers of Passengers.—When the relation of carrier and passenger is shown, the duties of the former will be inferred without being specifically pleaded. (Ala.) Birmingham Ry. etc. Co. v. Adams, 27.

11. PLEADING that Defendant was a Common Carrier, When Need not be Specifically Averred.—A pleading averring that the plaintiff was a passenger on the defendant's railway, and that the injuries of which he complains were proximately caused by the negligence of the defendant's servants in and about the carriage of the plaintiff as a passenger of the defendant, sufficiently avers that the plaintiff was accepted as a passenger of defendant, and that it undertook the service of carrying him as such passenger. (Ala.) Birmingham Ry. etc. Co. v. Adams, 27.

12. CONSTRUCTION OF WORDS.—The Word "Passenger" means one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier on the payment of fare, or what is accepted as an equivalent therefor. (Ala.) Birmingham Ry. etc. Co. v. Adams, 27.

Street Railways.

13. STREET RAILWAYS, Custom of to Carry Children Without Compensation.—In an action against a street railway company to recover for injuries to a child, it is competent for the plaintiff to show the general custom of the defendant not to charge fare for children of the plaintiff's age. (Ala.) Ball v. Mobile Light and Power Co., 32.

14. STREET RAILWAYS, Liability of for Injuries to Children for Whose Carriage No Fare is Paid.—Where it is the custom of a street railway to carry children without the payment of fare when riding with older persons, there is no doubt that the relation of carrier and passenger exists between the railway and the children, making the railway companies answerable for injuries to children due to the negligence of the former's servants. (Ala.) Ball v. Mobile Light and Power Co., 32.

15. STREET RAILWAYS—Negligence, When a Question for the Jury.—If in an action against a street railway company for injuries to a child, the evidence tends to show that the car was stopped with unusual suddenness and a jerk, and by such sudden stopping the child was thrown from the seat and injured, the court cannot say, as a matter of law, that the defendant's servants were not guilty of negligence. (Ala.) *Ball v. Mobile Light and Power Co.*, 32.

16. STREET RAILWAYS—Liability.—Street railway companies are common carriers of passengers for hire, and liable as other common carriers upon common-law principles. They are bound to exercise extraordinary care and the utmost skill, diligence and human foresight for the protection of their passengers, and are liable for the slightest negligence, but they are not insurers. (Neb.) *Lincoln Traction Co. v. Webb*, 879.

17. STREET RAILWAYS—Presumption of Negligence from Mere Injury.—Proof of mere injury by a street railway company, without more, does not raise a presumption of negligence sufficient to impose the burden of proof of due care upon the company, and, to enable the plaintiff to recover, he must prove an accident from which the injury resulted, or circumstances of such character as to impute negligence. (Neb.) *Lincoln Traction Co. v. Webb*, 879.

18. STREET RAILWAYS—Negligence—Burden of Proof.—In an action against a street railway on its common-law liability for personal injury, the burden is on the plaintiff to prove that he was a passenger, was injured by the negligence of the defendant, or circumstances such as to impute negligence on its part, and the extent of his injury. (Neb.) *Lincoln Traction Co. v. Webb*, 879.

19. STREET RAILWAYS—Negligence—Presumption—Burden of Proof.—If the nature of an accident on a street railway causing personal injury, when proved or conceded, is such as to fairly raise a presumption of negligence, proof of such accident, it being the proximate cause of the injury complained of, is sufficient. (Neb.) *Lincoln Traction Co. v. Webb*, 879.

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20. CARRIERS—Contracts Limiting Liability for Loss—Baggage. A railroad ticket signed by the passenger containing a recital that in consideration of its being sold at a reduced rate the passenger agrees that the value of his baggage shall not exceed a certain amount, is a sufficient consideration for any contract which the carrier may lawfully make respecting the transportation of both passenger and baggage, and it is not necessary that there be an independent consideration for each and every paragraph or provision of the contract of transportation to make it binding, as all such provisions, taken together, constitute one entire contract. (Mont.) *Rose v. Northern Pacific Ry. Co.*, 836.

21. CARRIERS—Contracts Limiting Liability for Loss of Baggage—Evidence.—If a railroad ticket reciting that, in consideration of its being sold at a reduced rate, the carrier's liability for loss of the passenger's baggage is limited to a certain amount, is signed and accepted by the passenger, evidence, in an action to recover for loss of baggage, that nothing was said to the passenger about a reduced rate, or a limitation on the value of his baggage, is properly excluded as irrelevant. (Mont.) *Rose v. Northern Pacific Ry. Co.*, 836.

22. CARRIERS—Contract Limiting Liability for Loss of Baggage—Estoppel to Deny Knowledge of Contents.—A railroad passenger signing a ticket stipulating for a limitation upon the carrier's

liability for the loss of such passenger's baggage, cannot, in the absence of fraud, be heard to say that he did not know nor understand the contents of such ticket. (Mont.) *Rose v. Northern Pacific Ry. Co.*, 836.

23. CARRIERS—Contract Limiting Liability for Loss of Baggage—Limited Tickets.—If a railway passenger signs and accepts a ticket reciting that in consideration of its being sold at a reduced rate, the carrier's liability for loss of the baggage is limited to a certain amount, the passenger cannot urge, in an action to recover for the loss of his baggage, as a ground of recovery that he did not know or understand the contents of such ticket, and that he should have been accorded an opportunity to determine for himself whether he would accept such limited ticket or procure an unlimited one. (Mont.) *Rose v. Northern Pacific Ry. Co.*, 836.

24. CARRIERS—Contract Limiting Liability for Loss of Baggage—Validity.—A carrier may validly limit his liability for the loss of baggage by stipulation in passenger tickets, that, in consideration of their being sold at reduced rates, the liability of the carrier for the loss of the passenger's baggage is limited to a certain reasonable stated amount. (Mont.) *Rose v. Northern Pacific Ry. Co.*, 836.

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25. SLEEPING-CAR COMPANY—Loss of Passenger's Effects.—It is the duty of a sleeping-car company to exercise reasonable care to guard the personal effects which a passenger may reasonably be expected to carry with her on her journey, including articles of personal adornment and jewels; and if, through want of such care, these effects are stolen, the company is liable therefor. (Ga.) *Pullman Co. v. Green*, 368.

26. SLEEPING-CAR COMPANY—Loss of Passenger's Effects.—It cannot be said as a matter of law that a passenger who leaves in her berth articles of apparel or adornment during the time she is making her toilet in the morning is guilty of such contributory negligence as will defeat a recovery against the sleeping-car company for their loss. (Ga.) *Pullman Co. v. Green*, 368.

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CERTIORARI—When Appropriate Remedy.—An appeal from an order restraining the use of voting machines which cannot be determined until after election is not such an adequate remedy as precludes a resort to proceedings by certiorari to test the validity of the order on the ground of its being in excess of jurisdiction. (Iowa) *United States Standard Voting Machine Co. v. Hobson*, 539.

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2. CHATTEL MORTGAGES—Removal of Grain—Bona Fide Purchaser.—If mortgaged grain has been removed from the land of the mortgagor, it is prima facie free from encumbrance, and the mere

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3. CHATTEL MORTGAGES—Removal of Grain—Bona Fide Purchaser—Estoppel.—If mortgaged grain has been removed from the land of the mortgagor, a buyer of it has a right to presume that the mortgage lien has been extinguished, and unless he has in some way estopped himself to deny the continued existence of such lien, he may safely buy as an innocent purchaser. (Mont.) *Brande v. Babcock Hardware Co.*, 858.

4. CHATTEL MORTGAGES—Waiver of Lien.—If an agent of the mortgagee takes a mortgage on a crop of grain in his own name for the benefit of his principal, and agrees with a third person, furnishing the seed, that he may purchase the crop at an agreed price and pay him the balance due after deducting the cost of the seed, such agent, if he does not waive the mortgage lien altogether, at least sells it for such third person's promise to pay the balance of the purchase price to him. (Mont.) *Brande v. Babcock Hardware Co.*, 858.

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4. **DUE PROCESS OF LAW, Changes in.**—The in common use at the times of the adoption of the constitutions must be taken to have been underst as embraced within the term "due process of law," the taking of life, liberty, or property without those who adopted these constitutions did not int the details of practice and procedure then exist remain unchanged. The legislature may devise unprecedented methods of procedure, provided t ties affected the substantial securities against just spoliation which are embraced within the dence prevailing throughout the land. (Cal.) etc. Co. v. Kerrigan, 199.

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6. CONSTITUTIONAL LAW.—The Exercise of the Police Power is subject to the supervision of the courts, but police regulations may not be declared void merely because deemed contrary to natural justice and equity, but only because they violate some constitutional right. (Ind.) State v. Richcreek, 491.

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For Benefit of Third Persons.

1. CONTRACTS for Benefit of Third Person—Right to Sue on.—A city, as the trustee of an express trust, cannot, unless especially authorized by its contract for the improvement of a street, maintain a suit for the use and benefit of abutting owners on the street, against the contractor and his bondsmen for damages to such property owners, caused by a breach of the contract. (Mo.) City of St. Louis v. G. H. Wright Contracting Co., 810.

2. CONTRACTS for the Benefit of Third Persons—Parties—Right to Sue on.—If the third party is not named in a contract made by a city to improve a street for the use of such third party, the latter is the public, and not the abutting property owners, who are assessed to pay the cost of the improvement, and such a contract does not authorize the city to sue, for the use and benefit of such owners, for a breach thereof by the contractor. (Mo.) City of St. Louis v. G. H. Wright Contracting Co., 810.

3. CONTRACTS for Benefit of Third Persons—Right to Sue When Third Parties Named.—If a bond given in connection with a contract made by a city for the improvement of a street provides that the contractor shall faithfully and properly perform the contract, and that the bond may be sued on at the instance of any materialman, laboring man or mechanic, in the name of the city, to his use, for any breach thereof, the city can sue for the use of such parties only as are named in the bond, and it has no power to sue for the use of the abutting owners on the street to be improved for a breach of such contract. (Mo.) City of St. Louis v. G. H. Wright Contracting Co., 810.

4. CONTRACTS for Benefit of Third Persons—Power of City to Make.—A city has no intrinsic power to make a contract authorizing it to maintain a suit for the use and benefit of abutting property owners against a contractor and his bondsmen for a failure to perform a contract, made by the city for the improvement of the street. (Mo.) City of St. Louis v. G. H. Wright Contracting Co., 810.

5. CONTRACT for Benefit of Third Persons—City as Agent for Property Owners. Although a city in making a contract for street improvement is required to let it to the lowest bidder, this does not

constitute it the agent of the abutting property owners, so as to entitle it to sue for their use for damages to them arising from a breach of the contract. (Mo.) *City of St. Louis v. G. H. Wright Contracting Co.*, 810.

6. **CONTRACT for Benefit of Third Persons—Right to Recover.**—Third persons to recover upon a contract entered into for their benefit must have either adopted the contract or complied with its provisions relating to them, or the debt or duty owing to such third party must have passed to or vested in the obligee of the contract before suit is brought. (Mo.) *City of St. Louis v. G. H. Wright Contracting Co.*, 810.

Conflict of Laws.

7. **CONFLICT OF LAWS—Contract to be Partly Performed in Two States.**—If a contract is made in one state to be performed in another, the law of the latter controls, but if the contract is to be partly performed in one state and partly in another state or country, the law of the place where made controls, unless a clear, mutual intention is manifested that it shall be controlled by the law of some other country. (N. C.) *Johnson v. Western Union Tel. Co.*, 961.

8. **A CONTRACT, Though Made and to be Performed in Another State, must be Construed by the Principles of the Common Law,** and in the absence of pleading and proof to the contrary, the court will presume that the common law of the state of the contract is the same as that of the state where the question is presented for decision. (Ala.) *Southern Express Co. v. Owens*, 41.

9. **PLEADING.**—The Rule that the Place of the Contract Governs can be Invoked Only by Appropriate Pleadings, followed by proof of the law of the foreign jurisdiction. (Ala.) *Southern Express Co. v. Owens*, 41.

Illegality.

10. **CONTRACTS, Void, Right of Strangers to Insist upon Void Character of.**—If contracts are for some reason void, then that they are so void may be insisted upon by persons not parties thereto, where a liability against them is sought to be asserted having its foundation on such contracts. (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

11. **A CONTRACT, Though not Illegal, may be Accompanied with Circumstances surrounding its making which would deter courts from enforcing it or rights based upon it.** (Tenn.) *Ingersoll v. Coal Creek Coal Co.*, 1003.

12. **CONTRACTS, ILLEGAL.**—Courts will not Entertain an Action in Affirmance of an illegal contract, though the party against whom relief is sought makes no objection on the ground of the illegality, or expressly waives it. (Cal.) *Union Collection Co. v. Buckman*, 164.

See Assignments.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Deeds; Vendor and Vendee.

CORPORATIONS.*In General.*

1. **CORPORATIONS.**—The Directors of a Corporation are trustees for the stockholders, to whom they owe perfect fidelity in the discharge of their duties. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

2. **CORPORATIONS—Liability of Officers and Stockholders.**—The stockholders and officers of a corporation are liable to it and its creditors for any acts of malfeasance, misfeasance or nonfeasance by which their rights are injuriously affected, and, as a consequence, for any loss arising out of their fraud or negligence. (N. C.) *McIver v. Young Hardware Co.*, 970.

3. **CORPORATIONS—The Trust Fund Doctrine.**—While, as between itself and its creditors, a corporation may be regarded simply as a debtor, still, as between its creditors and its stockholders, its assets are considered in equity as a fund for the payment of debts, and cannot be diverted from that purpose for the benefit of the latter, no matter what the form of the transaction by which the scheme of the transfer is consummated. (N. C.) *McIver v. Young Hardware Co.*, 970.

4. **CORPORATION—Liability of Stockholders, When not Affected by Charter Provisions.**—The provision in the charter of a corporation that no stockholder shall be liable for any debt, liability, contract, tort, omission or engagement of the corporation or other stockholder therein does not prevent the stockholders from being held liable as officers or directors for a joint tort or misfeasance committed by them to the prejudice of creditors. (N. C.) *McIver v. Young Hardware Co.*, 970.

5. **APPEAL AND ERROR—Service of Process Against Corporation not Appearing to be on Authorized Person.**—If it appears that there is a decree pro confesso, but it does not appear that the person on whom the service was made was a person on whom process could be served, the decree is erroneous. (Ala.) *Lea v. Iron Belt Mercantile Co.*, 93.

Powers—Ultra Vires.

6. **CORPORATIONS.**—Powers of Corporations in Affecting Their Objects are as broad and comprehensive as those of an individual when not expressly prohibited. (Neb.) *Herrick v. Humphrey Hardware Co.*, 917.

7. **CORPORATIONS—Ultra Vires Contracts.**—No action can be maintained by either party on an ultra vires contract—not even by a party who has fully executed the contract on his part. (Tenn.) *L. Leonhardt & Co. v. W. H. Small & Co.*, 994.

Promoters.

8. **CORPORATIONS—Right of Promoters of Compensation.**—Promoters of a corporation who render services in its organization with no view of compensation cannot enforce payment therefor against the corporation after it is organized. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

9. **CORPORATIONS—Relation of Promoters to Subscribers.**—Promoters of a corporation stand in a fiduciary relation to the company to be organized and those who subscribe for its stock, and are bound to act in good faith and to deal with them in perfect candor. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

Subscriptions to Stock.

10. **CORPORATIONS.**—A Subscriber to Stock has the Right to assume that others are paying the same price for stock that he is contracting to pay. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

11. **CORPORATIONS.**—The Issue of Stock Gratuitously is violative of the rights of other stockholders and creditors of the corporation, even though the directors believe that all the stock will attain par value. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

12. **CORPORATIONS.**—Directors Who Fail to Disclose to a Subscriber to stock that they are gratuitous holders of a majority of the shares are guilty of fraudulent concealment and liable for damages resulting therefrom. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

13. **CORPORATIONS.**—Representations to Subscribers that stock is nonassessable, which are merely expressive of an opinion, do not obviate the further misstatement that the stock is fully paid. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

14. **CORPORATIONS.**—Recovery of Money Paid for Stock.—Representations by the directors to a subscriber of stock that promoters of the corporation paid for the stock held by them, when in fact they did not, entitles him to recover the sum he was thereby induced to pay for the certificate issued to him. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

15. **CORPORATIONS.**—Parol Evidence of Fraud in Sale of Stock. The rule that parol representations are not admissible to vary the terms of a written agreement has no application to representations which amount to a fraud practiced in procuring subscriptions to corporate stock. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

16. **CORPORATIONS.**—Rescission of Subscriptions of Stock After Insolvency.—A subscriber to stock may, notwithstanding the insolvency of the corporation, rescind his subscription on the ground of fraud, if he has been diligent in discovering the fraud and repudiating the transaction, unless proceedings in insolvency have been instituted or some act of insolvency committed. (Iowa) *Hinkley v. Oil and Pipe Line Co.*, 564.

Lien of Stock.

17. **CORPORATIONS.**—Lien on Its Stock.—At common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company, and such a lien will not be enforced, unless created by statute, charter or by law. (Neb.) *Herrick v. Humphrey Hardware Co.*, 917.

Issuance of Stock, at Overvaluation.

18. **CORPORATION.** Notice to Creditors of that Stock was Issued for Property Taken at an Overvaluation.—Though property has been received at an overvaluation in payment of a subscription to the stock of a corporation, its creditors who take such stock with knowledge of the overvaluation and payment thereby cannot assail the transaction. (Ala.) *Lea v. Iron Belt Mercantile Co.*, 93.

19. **CORPORATION.** Knowledge of Chief Stockholder and Manager, When must be Imputed to It.—If one who is the manager and chief stockholder in a corporation and constitutes its alter ego has knowledge of the fact that stock has been issued in another corporation for property received at an overvaluation, though such knowledge was acquired by him while not acting as agent of his corporation, such knowledge must be imputed to it, and precludes it as a creditor of the other corporation from maintaining a suit to assail

the transaction by which the stock of the latter corporation was issued, and compelling its stockholders to make additional payments on their subscriptions. (Ala.) *Lea v. Iron Belt Mercantile Co.*, 93.

Transfer of Stock.

20. **CORPORATIONS—Shares of Stock—Transfer of.**—Although shares of corporate stock are not, strictly speaking, negotiable instruments, yet they partake of the qualities of a negotiable security to such an extent that they pass from indorser to indorsee shorn of all secret liens against the stock in the hands of the original owner. (Neb.) *Herrick v. Humphrey Hardware Co.*, 917.

21. **CORPORATIONS—Transfer by One to Another, When Invalid.** Directors of a corporation, though they are also stockholders, cannot sell its property to anyone for their own benefit to the prejudice of its creditors. Hence, they cannot sell practically the entire property of the corporation upon a consideration moving to themselves. (N. C.) *McIver v. Young Hardware Co.*, 970.

Sale of Property and Franchise.

22. **CORPORATIONS—Sale of Franchise as Relief from Liability.** A corporation charged with a duty to the public cannot, by sale or otherwise, dispose of its property or franchises so as to relieve itself from liability for acts done or omitted without legislative sanction expressly exempting it from liability. (Ga.) *Georgia R. R. & B. Co. v. Haas*, 327.

23. **CORPORATIONS—Conveyance by One to Another, When Deemed Fraudulent.**—A sale by one corporation to another in consideration of the latter's delivering a specified amount of stock to the individual shareholders in the selling corporation and guaranteeing the payment of its debts is prima facie fraudulent as to the creditors of the selling corporation. (N. C.) *McIver v. Young Hardware Co.*, 970.

24. **CORPORATIONS, Directors of, When Answerable for Its Debts Because They have Disposed of Its Assets for Stock in Another Corporation.**—If the directors of a corporation in its behalf sell its assets to another corporation in consideration that the latter will issue to them a specified amount of its stock and pay the debts of the selling corporation, such directors, having disposed of its property wrongfully, are personally liable for the debts of such corporation, the property so disposed of having been of sufficient value to pay such debts, and the creditors cannot be compelled to accept the stock so agreed to be paid. (N. C.) *McIver v. Young Hardware Co.*, 970.

25. **A CORPORATION cannot be Regarded as a Bona Fide Purchaser for Value**, without notice, when another corporation sells to it its assets in consideration that the purchaser will make payment by assuming the debts of the selling corporation and by issuing a specified amount of its stock to the directors authorizing such sale. (N. C.) *McIver v. Young Hardware Co.*, 970.

26. **CORPORATION, Purchaser of Assets of One, When Becomes Answerable for the Latter's Liabilities.**—If one corporation sells its assets to another in consideration of the agreement of the latter to issue its stock in a specified amount to the directors of the selling corporation, the purchasing corporation and the directors of the selling corporation are jointly and severally liable to the receiver of the selling corporation for the payment of its liabilities, the property so sold having been of sufficient value to make such payment. (N. C.) *McIver v. Young Hardware Co.*, 970.

27. CORPORATIONS, Fraudulent Transfer from One to Another Though There is No Fraudulent Intent.—Where one corporation transfers its assets to another in consideration of an agreement that the latter will pay a specified sum on its capital stock to the stockholders and directors of the former in consideration of the liabilities of the selling corporation, the transaction is fraudulent as to its creditors, though no actual fraudulent intent can be imputed to the parties. (N. C.) *McIver v. Young Hardware Co.*, 970.

See *Receivers*, 2.

COSTS.

1. COSTS—Memorandum of—Burden of Proof.—A memorandum of items of costs, duly verified, served on the opposite party and duly filed, is prima facie evidence that the items were properly expended and therefore taxable, unless, as matter of law, they appear otherwise upon the face and the burden of proving that such items were not properly taxable is upon the other party. (Mont.) *Brande v. Babcock Hardware Co.*, 858.

2. COSTS.—The Court may Tax the Costs of a suit by a widow to rescind her election to take under the law instead of under her husband's will against the particular defendants who fraudulently procured the election to be made. (Ind.) *Whitesell v. Strickler*, 524.

3. COSTS.—If One of Several Defendants makes a separate issue, which is declared against him, he is liable for the costs. (Ind.) *Whitesell v. Strickler*, 524.

COUNTERCLAIMS.

See *Setoff and Counterclaim*.

COURTS.

COURTS—Concurrent Jurisdiction—Review of Judgments.—Courts of concurrent jurisdiction have no power to review or supervise by writ of habeas corpus the judgments of one another. (Colo.) *Martin v. District Court*, 262.

Note.

Creditors, appeal by from judgments against their debtors, 754, 760.

CRIMINAL LAW.

Custom.

1. CRIMINAL LAW—Custom as Defense to Crime.—A local custom cannot operate to suspend a criminal statute, or to overthrow the rules of evidence by which the commission of an offense is proved. (Neb.) *Crockford v. State*, 876.

Evidence.

2. EVIDENCE—Trailing of Dogs.—After evidence as to the nature and training of dogs, the testimony of a witness may be received as to their trailing of a defendant accused of crime. (Ala.) *Hargrove v. State*, 60.

3. EVIDENCE—Tracks and Defendant's Shoes.—Evidence that the tracks of the defendant's shoes corresponded in length and width with the tracks found at the scene of the crime is admissible. (Ala.) *Hargrove v. State*, 60.

Confessions.

4. **CRIMINAL LAW—Confessions as Evidence—Question for Court.**—The determination of the question as to whether a confession alleged to have been made by one accused of crime is admissible is for the court alone. (Mont.) *State v. Sherman*, 869.

5. **CRIMINAL LAW—Confessions as Evidence—Review on Appeal.**—The examination of the evidence touching the admissibility of the confession of one accused of crime, and the action of the court thereon, must be conducted in the presence of the jury, to entitle the action of the court to review on appeal. (Mont.) *State v. Sherman*, 869.

6. **CRIMINAL LAW—Confessions as Evidence—Right of Jury.** The jury is not absolutely bound to believe the facts narrated in the confession of one accused of crime and admitted in evidence by the court, but may give them such weight as it deems proper, and in determining the weight to be given to them it may consider all the circumstances under which the confession was made, and the jury must, therefore, hear the evidence touching the making of such confession, although it is addressed primarily to the court. (Mont.) *State v. Sherman*, 869.

7. **CRIMINAL LAW—Confessions as Evidence—Inducements.**—A confession of one accused of crime procured by an inducement held out by one in authority is admissible, unless it was procured under circumstances indicating that the inducement held out to the accused was sufficient to induce a reasonable person, in a like situation to speak regardless of the truth or falsity of his statement, rather than remain silent. (Mont.) *State v. Sherman*, 869.

Trial.

8. **TRIAL—Instructions—Harmless Error.**—Failure to instruct the jury on admissions or statements made by the accused to the effect that what he said against himself should be taken as true, in relation to admissions contained in certain letters written by him, is not prejudicial to him and is harmless error. (Mo.) *State v. Oakes*, 792.

9. **TRIAL—Improper Remarks by Counsel—Correction by Court.** If the trial court corrects counsel by telling him that remarks made by him in argument are clearly outside the record and improper, this is sufficient to prevent the arousing of prejudice in the minds of the jury against the defendant, and will prevent such remarks from working a reversal of the judgment. (Mo.) *State v. Oakes*, 792.

Reasonable Doubt.

10. **CRIMINAL LAW—Reasonable Doubt—Instructions.**—In a criminal case, each juror, as distinguished from the jury as a whole, must be convinced beyond a reasonable doubt of the guilt of the defendant, before the jury can convict, and a refusal to give an instruction to this effect is error. (Miss.) *Bell v. State*, 722.

11. **APPEAL—Definition of Reasonable Doubt.**—A judgment will not be reversed solely on the ground that a questionable definition of reasonable doubt is given to the jury. (Neb.) *Junod v. State*, 890.

Former Jeopardy.

12. **CRIMINAL LAW—Former Acquittal—Plea in Bar.**—If two counts in an indictment charge two separate and distinct offenses, resting on different essential elements, an acquittal on one count does not bar a prosecution for the offense charged in the other count, and a plea in bar, setting up the acquittal as to the one count,

and alleging that the offense charged in the other count grew out of the same transaction as that contained in the count upon which the acquittal was had, and that the evidence to be given on the impending trial would be the same as that given on the first trial, presents a pure question of law, apparent upon the face of the record, and a demurrer to such plea is properly sustained. (Mo.) *State v. Oakes*, 792.

See *Venue*.

DEATH.

DEATH.—A Foreign Administrator may Maintain an Action for the wrongful death of his intestate. (Ark.) *St. Louis etc. Ry. Co. v. Graham*, 112.

DEEDS.

Execution.

1. **CONVEYANCE, Necessity for a Grantee.**—A conveyance is void unless the grantee named is capable of taking and holding the property, and the grantee must be a person either natural or artificial. (Cal.) *Rixford v. Zeigler*, 229.

2. **A CONVEYANCE Designating the Grantee as "the Community Styling Itself the German Roman Catholic St. Bonifazious Church Community,"** there being no corporation de facto or de jure, and the community being an unincorporated association of persons for religious worship, no member of which ever undertook to take possession of the property or to use it for any purpose specified in the conveyance, transfers no title and leaves the property subject to execution sale against the grantor. (Cal.) *Rixford v. Zeigler*, 229.

3. **DEEDS—Delivery with Name of Grantee in Blank.**—A deed left blank as to the grantee, but otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance with authority to insert the name. (Iowa) *Hall v. Kary*, 639.

4. **DEEDS—Delivery with Name of Grantee in Blank—Good Faith Purchaser.**—One who, for full consideration and without notice of fraud, takes a conveyance of property by delivery of a deed executed and delivered to his grantor by a prior owner and blank as to name of the grantee, becomes a purchaser without notice as effectually as though his grantor had executed a direct conveyance. (Iowa) *Hall v. Kary*, 639.

Delivery.

5. **CONVEYANCE.**—Delivery is a Necessary Incident to the execution of deed, without which it cannot take effect. (Ala.) *Napier v. Elliott*, 17.

6. **CONVEYANCE.**—Registration is not Conclusive Evidence of Delivery, but may be rebutted. (Ala.) *Napier v. Elliott*, 17.

7. **CONVEYANCE.**—Delivery Rests on Intention and is to be Collected from all the acts and declarations of the parties having relation to it. (Ala.) *Napier v. Elliott*, 17.

8. **CONVEYANCE—Delivery.**—Declarations of the Grantor at the Signing and Acknowledgment of a Deed explanatory of his subsequent act in procuring its registration are competent evidence on the question of delivery. (Ala.) *Napier v. Elliott*, 17.

Construction.

9. **CONVEYANCE, Construing in Case of Patent Ambiguity.**—If an ambiguity is patent on the face of a deed, parol evidence of in-

tention is not admissible, but the instrument must be construed by the court, and it is entitled to the whole of the circumstances surrounding the parties, to enable it to determine the property intended to be conveyed. (Ala.) Reynolds v. Lawrence, 78.

10. CONVEYANCE—Parol Evidence to Aid in Construing.—Where the lands are described in the conveyance as S. $\frac{1}{2}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of a designated section, parol evidence is admissible to prove that all of the lands thus described were intended to be in the NW. $\frac{1}{4}$ of such section. (Ala.) Reynolds v. Lawrence, 78.

11. CONVEYANCE—Construction by Reference to Number of Acres Specified.—If part of the lands conveyed are described as "S. $\frac{1}{2}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, sec. 29," and the conveyance states that the whole of the lands amount to one hundred and sixty acres, the deed must be construed as conveying the south half of the northwest quarter of the section, for otherwise it would embrace much more than the number of acres specified. (Ala.) Reynolds v. Lawrence, 78.

See Acknowledgments.

Note.

Deeds, forged, what amounts to uttering of, 319.

Definition of desertion as a cause for divorce, 618.

DESCENT.

1. CHILD EN VENTRE SA MERE, Inheritance of.—Upon the death of a father, the inheritance vests immediately in his child en ventre sa mere as well as in his children already born. (N. C.) Deal v. Sexton, 943.

2. A CHILD EN VENTRE SA MERE, for all the Beneficial Purposes of Heirship, is considered as absolutely born. (N. C.) Deal v. Sexton, 943.

DIVORCE.

1. DIVORCE—Desertion—Cessation of Intercourse.—Cohabitation, as well as marital intercourse, must be abandoned and there must be a complete separation to constitute such desertion as entitles the unoffending spouse to a decree of divorce. (Iowa) Pfannebecker v. Pfannebecker, 608.

2. DIVORCE—Desertion—Refusal to have Marital Intercourse.—If the condition of health of a wife is such as to justify her in declining to indulge in marital intercourse, such conduct does not constitute desertion. (Iowa) Pfannebecker v. Pfannebecker, 608.

3. DIVORCE—Cruelty.—Persistent nagging on the part of a wife, together with her unfounded accusations of infidelity on the part of her husband, not impairing his health so as endanger his life, does not constitute such cruelty as justifies divorce. (Iowa) Pfannebecker v. Pfannebecker, 608.

4. DIVORCE—Cruelty—Refusal to Cohabit.—Refusal of cohabitation by a wife with her husband for three years is extreme cruelty, and a ground for divorce. (Mich.) Campbell v. Campbell, 660.

5. DIVORCE—Cruelty—Accusations of Infidelity.—Repeated and unfounded accusations by a wife of adultery committed by her husband, if made in the presence of others, constitutes extreme cruelty, and is ground for divorce. (Mich.) Campbell v. Campbell, 660.

Note.

Divorce, desertion, absence justified by the conduct of the other spouse, 619.

desertion, advances and concessions to terminate, 624, 625.

desertion, both spouses cannot at the same time be guilty of, 626.

desertion, by conduct requiring the other spouse to absent herself, 627.

desertion, consent to, what amounts to, 631.

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desertion, cruel conduct causing, 626.

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desertion, domicile, refusal to follow husband to may amount to, 636.

desertion, duration and continuity of separation essential to, 622.

desertion, essentials of, 618.

desertion, evidence of, what sufficient, 619.

desertion, failure to support does not amount to, 634, 635.

desertion, failure to support does not constitute, 618.

desertion, failure to support does not justify, 635.

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desertion, innocent spouse, duty of to seek to avoid, 623, 624.

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desertion, intent not to return is essential to, 618.

desertion, intent, when should be presumed, 620.

desertion is not inferable from the mere fact that the spouses do not live together, 621.

desertion, living apart under articles of separation is not, 621.

desertion, malicious, intentional is, 626.

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desertion must be willful, 619, 620, 626.

desertion must be without sufficient reason, 626.

desertion, offer to return after, 625.

desertion, offer to terminate, what does not amount to, 624.

desertion, permanent change of domicile without the consent of the other spouse, 630.

desertion, reconciliation, duty to seek, 623.

desertion, refusal of wife to live in husband's home, 631, 632.

desertion, refusal to discontinue though originally for a sufficient cause, 625.

desertion, refusal to receive spouse guilty of, 624, 625.

desertion, separation, articles of do not necessarily disprove, 624.

desertion, separation by consent is not, 620.

desertion, separation due to poverty does not constitute, 619.

desertion, separation during the pendency of divorce proceedings does not constitute, 637, 638.

desertion, separation satisfactory to the other spouse does not amount to, 631.

desertion, separation, two periods of cannot be united to constitute, 634.

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desertion, time when deemed to have commenced, 621.

desertion, voluntary separation, when changed into, 621.

DOGS.

See Animals; Criminal Law, 2-3.

DOWER.

1. **VENDOR AND PURCHASER—Mistake—Dower.**—If the purchaser at an administrator's sale obtains the fee simple title to the decedent's homestead, under the mistaken belief on the part of the administrator, shared in by the purchaser or induced by his fraud, that it is subject to dower, and the purchaser does not pay for that, he may be compelled to pay the value of the dower interest. (Mo.) *Chrisman v. Linderman*, 822.

2. **DOWER—Destruction of.**—Nothing except a plain mandate of the statute, or a statutory command, deduced by necessary implications, will suffice to set aside and destroy the dower right. (Mo.) *Chrisman v. Linderman*, 822.

3. **DOWER—Homesteads—Merger.**—The right of the wife to dower does not merge in her homestead. (Mo.) *Chrisman v. Linderman*, 822.

4. **DOWER—Homesteads—Construction of Statute.**—A statute providing that no dower shall be assigned to the widow when the homestead is greater than one-third of the real estate of which the husband died seised does not destroy the dower right. It continues to exist in the homestead, but the widow's right to its assignment is suspended during the existence of the homestead estate entirely overlapping it. (Mo.) *Chrisman v. Linderman*, 822.

5. **DOWER—Homesteads—Remarriage.**—Although a statute may forbid the assignment of dower when the homestead is greater than one-third of the decedent's estate, yet when the widow loses her homestead by marriage, she can then assert her claim to dower. (Mo.) *Chrisman v. Linderman*, 822.

6. **DOWER—Homesteads—Remarriage—Sale of Dower Right.**—If a widow has a homestead in all of the land owned by her husband at the time of his death, and she remarries, thereby losing her homestead, her dower right is not thereby extinguished, and a sale by the administrator of such land to pay the husband's debts does not convey to the purchaser the widow's dower. (Mo.) *Chrisman v. Linderman*, 822.

See Wills, 41-43.

DRAINAGE.

1. **DRAINAGE.—No Right to Construct an Artificial drain over the lands of another exists at the common law; and drainage statutes are given or withheld in the discretion of the legislature, and, when enacted, may be modified or repealed at the pleasure of that body.** (Ind.) *Taylor v. Strayer*, 469.

2. **DRAINAGE—Repeal of Statute.**—The Repealing clause of a drainage statute providing that "the repeal shall not affect any pending proceeding in which a ditch has been ordered established," means that only such proceedings shall be saved as have proceeded to a final order or judgment for the establishment of the ditch, and in which nothing remains but the execution of such judgment. It does not save an action which is on appeal in the circuit court from an order of the board of commissioners establishing a ditch. (Ind.) *Taylor v. Strayer*, 469.

3. **DRAINAGE.—In Repealing the Drainage Statutes in Indiana the legislature intended to save all pending ditch proceedings which**

had not progressed to final judgment, provided the proposed ditches were not designed to, and would not, affect lakes covering ten acres. (Ind.) Taylor v. Strayer, 469.

4. **DRAINAGE—Right to Repeal Statutes.**—In the exercise of the sovereign power of the state, it is the prerogative of the legislature to embody the policy of the state in such drainage laws as meets its approval, and to repeal existing laws upon that subject, unhampered by prior statutes. (Ind.) Taylor v. Strayer, 469.

5. **DRAINAGE—Repeal of Statute—Costs.**—The right to recover costs in drainage proceedings ceases with the repeal of the statute authorizing the recovery, unless the right has been reduced to final judgment. (Ind.) Taylor v. Strayer, 469.

6. **DRAINAGE—Repeal of Statute.**—A Plea to the Jurisdiction, based upon a statute enacted pending an appeal in drainage proceedings from the board of commissioners to the circuit court, is properly entertained after the time when ordinarily the issues would have been finally closed. (Ind.) Taylor v. Strayer, 469.

DUE PROCESS.

See Constitutional Law, 2-5.

EJECTMENT.

1. **EJECTMENT—For What Maintainable.**—Where One Erects a Building on his own land, but projects the foundation thereof into the soil under the surface of his neighbor's land, the latter may maintain ejectment to recover the portion of his property of which he is thereby ousted. (Ga.) Wachstein v. Christopher, 381.

2. **EJECTMENT—Adverse Possession—Case for Jury.**—If the answer in ejectment is a general denial and a plea of the statute of limitations, and there is some evidence tending to show that the defendants and those under whom they claim title have been in the adverse possession of the property for more than ten consecutive years before the commencement of the suit, the court properly refuses to take the case from the jury. (Mo.) Gordon v. Park, 802.

ELECTION.

See Wills, 41-43.

ELECTIONS.

1. **ELECTIONS.**—The Right to Vote is a Political, not a civil, right. (Iowa) United States Standard Voting Machine Co. v. Hobson, 539.

2. **ELECTIONS—Ballots—Nomination by Several Parties.**—A statute providing for a special election and making the provisions of the general election law applicable relating to the printing of ballots, prohibiting the printing of a name more than once thereon, entitles a candidate to have his name appear but once on the ballot, although he is nominated by several parties. (Mich.) Helme v. Board of Election Commissioners, 681.

3. **ELECTIONS—Voting Machines.**—A Court of Equity has no jurisdiction to restrain the use of voting machines at an election. (Iowa) United States Standard Voting Machine Co. v. Hobson, 539.

4. **ELECTIONS—Voting Machines.**—A Statute authorizing the use of voting machines is not unconstitutional. (Iowa) United States Standard Voting Machine Co. v. Hobson, 539.

5. ELECTIONS—Voting Machines—Secret Ballot.—Voting machines cannot be used at an election where it is impossible to so arrange the names of candidates upon such machines as to permit a voter to use for a certain desired combination of candidates. (Mich.) *Helme v. Board of Election Commissioners*, 681.

6. ELECTIONS—Constitutional Law—Voting Machines—Secret Ballot.—A statute which requires a voter at an election at which voting machines are used to call for a paper ballot if he desires to vote for a combination of candidates which cannot be voted for on such machines, is unconstitutional as violating his right to a secret ballot. (Mich.) *Helme v. Board of Election Commissioners*, 681.

7. ELECTIONS—Voting Machines—Secret Ballot.—Any kind of voting machine may lawfully be used at any election in which the choice between candidates can be expressed by the use of the machine, or by any other method which does not disclose to the inspector or others the purpose of the voter. (Mich.) *Helme v. Board of Election Commissioners*, 681.

ELECTRICITY.

1. ELECTRIC LIGHT COMPANIES—Liability to Children.—If a boy climbs into a tree, through the branches of which an uninsulated electric wire has been placed by an electric light company, and he is injured by coming in contact with such wire, the company is liable therefor, when the tree is such as any small boy would be attracted to and use in his play. (Miss.) *Temple v. McComb City etc. Co.*, 698.

2. ELECTRIC LIGHT COMPANIES—Negligence—Duty Toward Children.—The immemorial habit of small boys to climb small trees filled with abundant branches reaching almost to the ground is a habit of which electric corporations stretching their wires over such trees must take notice. (Miss.) *Temple v. McComb City etc. Co.*, 698.

EN VENTRE SA MERE.

See Descent; Partition 4.

EQUITY.

1. CHANCERY, Jurisdiction of may be Extended Beyond Action in Personam.—Though in the exercise of its inherent equity jurisdiction a court of chancery acts only in personam, the legislature may, so far as the constitutional provision regarding due process of law is concerned, confer upon such courts a jurisdiction which shall, as to property within the state, operate upon it in some other way than merely directing the defendants to do or refrain from doing some act concerning the property. The state has power to enact statutes under which the interests of persons in property within the state shall be affected so far as that property is concerned, though not personally served with process within the state. (Cal.) *Title and Documents etc. Co. v. Kerrigan*, 199.

2. EQUITY—Change of Status Pendente Lite—Relief.—If, upon the final hearing of a petition for an injunction, it appears that the equitable relief prayed for cannot be granted, because of a change in the status brought about since the filing of the action, the plaintiff may be awarded damages in lieu of the equitable relief sought. (Ga.) *Everett v. Tabor*, 324.

3. EQUITY—Relief Rendered Necessary by Acts Pendente Lite.—A plaintiff will not be cast out of a court of equity by conduct

of the defendant subsequent to the filing of the suit, while it is impossible to grant the relief originally prayed for, but in a proper case, the court will decree damages resulting from the defect, though recoverable only upon facts independent of those in the original suit. (Ga.) *Everett v. Tabor*, 324.

4. **EQUITY**—Relief Rendered Necessary by Acts Precluding Consummation of a fraud by the defendant pending the suit, making impossible the specific relief sought, will not deprive the court of equity of jurisdiction to grant other relief appropriate to the facts. (Ga.) *Everett v. Tabor*, 324.

See *Boundaries*.

ESTATES OF DECEDENTS.

See *Executors and Administrators*.

Note.

Estates of Decedents, conflict in proceeding to partition, 587
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settlement of, American statutes providing methods of,
title in, method of establishing at the common law, 586.

See *Partition*.

ESTOPPEL

ESTOPPEL.—Equity will not Permit a Wrongdoer retaining the fruits of his wrong, to interpose an act, intended to prevent recovery, wrongfully induced by him, as an estoppel as against the injured party in an action for redress. (Ind.) *Whitesell v. Strickler*,

EVIDENCE.

In General.

1. **CONTRACTS**—Parol Evidence to Vary.—If a stipulated bill of sale is clear and unambiguous, parol evidence is inadmissible to vary, add to, or contradict it. (Ga.) *Townsend v. South*
Co., 340.

2. **EVIDENCE** is Competent, Relevant and Admissible may not be such as of itself to establish a fact, if it is so prejudicial that a jury may, in connection with it and other facts properly made, make a finding respecting some issue material to the cause. *Clark v. Patapasco Guano Co.*, 931.

3. **EVIDENCE**—Credibility of Witnesses.—The testimony of witnesses, without qualification, that they heard a certain whistle at a highway crossing is of much more weight than those who say that they did not hear such whistle. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

4. **EVIDENCE**—Credibility of Witness.—A witness may be impeached by showing a conceivable attitude of attention or inattention, which affects the evidence value, or leave it with little or no weight. *Queen Anne's R. R. Co. v. Reed*, 301.

5. **EVIDENCE**—Statements as to Title—Competency of a third person in the possession of property as to the validity of the defendant's claim made in the presence of the latter, or brought to his knowledge, is not admissible in evidence. (Mich.) *Preston v. Newcomb*.

6. **EVIDENCE**—Exclusion of Harmless Error.—A question of the relations existing, whether friendly or otherwise, between certain parties is pertinent to the issue on trial,

of the trial court to permit an inquiry into such relations is not prejudicial, when during the trial the information sought has been called to the attention of the jury and the excepting counsel has failed to make a specific and comprehensive offer of proof. (Mont.) *Gehlert v. Quinn*, 864.

7. **EVIDENCE, Excluding on Motion.**—Where objection is not made to evidence or on the question calling for it, it is not a matter of right in a party against whom it is given to have it excluded on motion. (Ala.) *Tutwiler Coal etc. Co. v. Nichols*, 34.

8. **EVIDENCE—Testimony of Witness Since Deceased—Stenographic Notes—Identification of.**—If the stenographer who took the testimony of a witness since deceased is also dead at the time that such testimony is sought to be used, and no one can be found who can read his notes or speak as to the correctness of them, or of the transcript thereof, or to the fact that such transcript embodied the testimony of the witness as given at the former hearing, such testimony is not properly identified and is not admissible in evidence. (Mont.) *Pew v. Johnson*, 852.

Of Law and Decisions of Another State.

9. **EVIDENCE—Judicial Notice of the Decisions of the Courts of Another State cannot be Taken.**—Where the decision of the lower court of another state is relied upon, it must be offered in evidence. Otherwise, though it can be consulted as the court would consult the opinion of any reputable supreme court of a sister state, it does not bind as an adjudication. (Ala.) *Southern Express Co. v. Owens*, 41.

10. **EVIDENCE—Presumption as to Law of Another State.**—The common law is presumed to prevail in another state. (Ga.) *Ellington v. Harris*, 320.

Of Age of Person.

11. **EVIDENCE—Age of Members of Families—Certified Copies of Schedules Taken by an Officer of the United States and Forming Part of the Records of the Census taken at different dates are admissible for the purpose of showing the ages of the members of a family whose ages purport to be stated therein.** (Mo.) *Priddy v. Boice*, 762.

12. **EVIDENCE OF AGE.**—The Mutilation of a Tombstone and the Absence of a Family Record once in the Bible must be regarded as suspicious, and evidence thereof is admissible. (Mo.) *Priddy v. Boice*, 762.

Of Value of Property.

13. **EVIDENCE of the Value of Property.**—Where a carrier sued for property lost through its negligence, consisting of manuscript prepared by the plaintiff and having no ascertainable market value, it is proper to permit him to state to the jury the number of pages, the general character of their contents, the time and search consumed in production, and then to ask him to respond to the question, "From the time and labor devoted by you to the production of this manuscript and the contents of it, the matter contained in it, what would you say was the reasonable value of that manuscript?" (Ala.) *Southern Express Co. v. Owens*, 41.

14. **EVIDENCE OF VALUE.**—Where an Article Lost has No Market Value, the rule of damages seems to be its value to the plaintiff, and in ascertaining this value inquiry may be made into the constituent elements of its cost to him in producing it. (Ala.) *Southern Express Co. v. Owens*, 41.

See Criminal Law.

EXECUTION.

1. AN EXECUTION SALE for an Amount Largely in Excess of the true indebtedness, as where the judgment has been paid in part and the purchaser has notice of the payment, is void. (Ark.) *Downs v. Dennis*, 119.

2. EXECUTION SALES—Person Holding Contract of Purchaser. The interest in land held by virtue of a contract of purchase is subject to levy and sale, and the lien of the judgment and levy attaches to the interest in the land, and cannot be divested by a subsequent surrender of the contract. (Iowa) *Thomassen v. De Goey*, 605.

3. EXECUTION SALES—Collateral Attack.—Irregularities in an execution sale, not rendering it absolutely void, cannot be questioned in injunction proceedings. (Iowa) *Thomassen v. De Goey*, 605.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS, Personal Property Must Pass to the Possession of, Notwithstanding the Testator Agreed not to Make a Will.—If the owner of personal property executes a valid agreement not to make any disposition of it by will, and appoints an executor, the personal property must pass to the executor, who must account therefor to the heirs for the portions to which each would have been entitled had no will been made. (Ill.) *Jones v. Abbott*, 412.

2. ESTATE OF DECEDENT—Accounting for Rents.—A widow in possession of an estate pending administration should account for the rents in the probate proceedings, not in a suit for partition. (Iowa) *Smith v. Smith*, 581.

See Attachments, 4.

FALSE IMPRISONMENT.

FALSE IMPRISONMENT—Mitigation of Damages.—In an action for false imprisonment in arresting a woman on suspicion that she was plying a prostitute's vocation, or intended to do so by solicitation, the arresting officer is entitled to show, in mitigation of damages, that his superior officers had ordered the arrest of all women found on the street under the circumstances in which the arrest in question was made. (Mich.) *Klein v. Pollard*, 670.

FIRE-ESCAPES.

See Landlord and Tenant, 2-4; Negligence, 6.

FIXTURES.

See Railroads, 1.

FORFEITURES.

CONTRACTS—Forfeitures—Notice.—If a provision for a forfeiture contained in a contract is dependent upon the giving of a certain written notice, and it be such that it can be enforced, it must appear that the notice was given in compliance with the contract both as to time and contents, and that default has occurred. (Ga.) *Georgia R. R. & B. Co. v. Haas*, 327.

FORMER JEOPARDY.

See Criminal Law, 12.

FORGERY.

1. FORGERY—Sufficient Uttering to Constitute.—An allegation of uttering and publishing a forged instrument is proved by evidence that the prisoner offered to pass such instrument to another declaring or asserting, directly or indirectly, by words or actions, that it was good, although such offer was not accepted, nor the instrument exhibited. (Ga.) Walker v. State, 314.

2. FORGERY—Evidence of.—On a trial for forgery, it is competent for the prosecution to prove that immediately before the date when the alleged forged check was cashed, the accused was without means and in need of money, and that immediately thereafter he had a considerable sum of money and presented a ten dollar bill in payment of a debt. (Ga.) Walker v. State, 314.

Note.

Forgery, attempt to utter, what amounts to, 318.

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uttering must be with knowledge of falseness, 318.

uttering of forged check, what amounts to, 319.

uttering of forged deeds by placing them of record, 319.

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wills, uttering of forged, what amounts to, 317.

FRAUD.

1. FRAUD—Degree of Proof—Instructions.—An instruction that fraud is never presumed, but must be clearly and distinctly proved, is erroneous, as requiring something more than a bare preponderance of the evidence to prove it, and therefore imposing too great a burden on the party alleging it. (Mont.) Gehlert v. Quinn, 864.

2. FRAUD—Procurement by Third Person.—A transaction is not purged of fraud by showing that it was brought about by a third person. (Ind.) Whitesell v. Strickler, 524.

3. FRAUD AND UNDUE INFLUENCE—Persons in Confidential Relations.—In all cases where the relations in life are such that influence is acquired by one and confidence reposed by another, so as to give opportunity for imposition or undue influence, and where one of the parties, by reason of his surroundings, is unable to treat with the other upon terms of equality, courts of equity will carefully scrutinize the dealings between them and compel restoration in the absence of absolute fairness. (Ind.) Whitesell v. Strickler, 524.

FRAUDULENT CONVEYANCE.

1. FRAUDULENT CONVEYANCE—Allegation of Insolvency. In an action to set aside a fraudulent conveyance it is not to allege and prove the insolvency of the grantor at the time of the transfer. (Iowa) *Crary v. Kurtz*, 549.

2. FRAUDULENT CONVEYANCE—Presumption of a Voluntary conveyance which will defeat the collection of an indebtedness, because of the insolvency of the grantor, is presumed to be made for that purpose. (Iowa) *Crary v. Kurtz*, 549.

3. FRAUDULENT CONVEYANCE.—The Reduction of Claims to Judgment is not a condition precedent to the trustee in bankruptcy to have a conveyance of the bankrupt as fraudulent. (Iowa) *Crary v. Kurtz*, 549.

4. FRAUDULENT CONVEYANCE.—A Trustee in Bankruptcy cannot maintain an action to set aside as fraudulent a conveyance made by the bankrupt, unless he alleges and proves that the claim against the bankrupt has been filed and allowed as contemplated by law. *Crary v. Kurtz*, 549.

GAMING.

1. GAMBLING DEBTS.—The Holder of a Non-negotiable Note given for a Gambling Debt, though he has no notice of the circumstances under which it was given, cannot recover thereon, any note given in renewal thereof, nor upon any note given in renewal of an action founded upon the original note or renewal thereof. (Cal.) *Union Collection Co. v. Buckman*, 164.

2. GAMBLING NOTES.—When the consideration of a Note is an indebtedness for money lost at a gambling place, it is against public policy, and no recovery can be had thereon. (Cal.) *Union Collection Co. v. Buckman*, 164.

3. GAMBLING NOTES.—An Assignee of a Non-negotiable Note given for a gambling debt is in no better a position than the payee. (Cal.) *Union Collection Co. v. Buckman*, 164.

4. NEGOTIABLE GAMBLING NOTES.—Burden of Proof in an action is brought by an indorsee of a negotiable note, shown that the consideration is illegal, the plaintiff must bear the burden of proving that he took without notice, before maturity, for value. (Cal.) *Union Collection Co. v. Buckman*, 164.

5. GAMBLING NOTES—Renewals of.—When a non-negotiable note has been given for a gambling debt, like notes given in renewal have no more validity than the original note. (Cal.) *Union Collection Co. v. Buckman*, 164.

Note.

Gambling Contracts, assignee of with notice cannot recover bills of sale given to secure, 179.

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GARNISHMENT.

GARNISHMENT—Sites of Debt—Constitutional Law.—A statute is not unconstitutional because it permits the garnishment of the wages of a railway employé, the railway company having lines and agents both in this and in another state, the wages being earned and payable in such other state, and the employé there residing. (Ga.) *Harvey v. Thompson*, 373.

GUARDIAN AND WARD.

Sales and Mortgages.

1. **GUARDIAN AND WARD, Application of the Former to the Court for Instructions.**—The guardian of a non compos mentis who executes a mortgage under a decree of court has the same right to apply to it for instructions, if they are necessary to the execution of his trust, as is accorded to trustees. (Ala.) *Montgomery v. Perryman & Co.*, 61.

2. **WHEN A GUARDIAN'S SALE is Made Under a Decree, the Court must be Regarded as the Vendor.** (Ala.) *Montgomery v. Perryman & Co.*, 61.

3. **A GUARDIAN'S SALE, Until Confirmed by the Court Authorizing it, confers no rights, whether the sale is public or private.** (Ala.) *Montgomery v. Perryman & Co.*, 61.

4. **GUARDIAN'S MORTGAGE, Reformation of.**—A mortgage executed by a guardian upon a ward's property when the property is not described in the decree authorizing the mortgage, and the mortgage is not confirmed by the court, is invalid. Hence, if it does not correctly describe the property intended to be mortgaged, it cannot be reformed and foreclosed in equity. (Ala.) *Montgomery v. Perryman & Co.*, 61.

5. **GUARDIAN AND WARD—Mortgage by Former to Latter and Release of Without Order of Court.**—If a guardian borrows or embezzles funds of his ward, then only one year old, and subsequently, for the purpose of borrowing more money, enters a satisfaction of such mortgage, signing the ward's name by himself as guardian, and receives from the second mortgagee money sufficient to pay the debt of the ward, and afterward sells the property to innocent purchasers, the money received by the guardian, whether from such second mortgagee or such purchaser, must to the extent necessary be deemed the money of the ward, and operates to discharge the mortgage to him, though the guardian subsequently embezzles it, and the ward is not entitled to foreclose his mortgage. (Cal.) *Cummings v. Strobbridge Land Syndicate*, 189.

Right to Commissions.

6. **GUARDIANS, Commissions of are Subject to the Discretion of the Court.**—Though a guardian has administered the estate of his ward in a very careless manner, the appellate court will not interfere with the order of the lower court allowing commissions to such guardian. (Mo.) *In re Switzer*, 731.

Liability of Sureties.

7. **GUARDIAN, Sureties of are not Responsible for Defalcations of Their Principal While Administrator.**—If an administrator during the pendency of his administration is guilty of the conversion of property and is afterward appointed guardian of the heirs, his sureties in the latter capacity cannot be made answerable for his defaults as administrator. (Mo.) *In re Switzer*, 731.

8. **GUARDIAN, Sureties of, When not Bound by a Receipt of Their Principal as Administrator.**—If a person has acted as administrator of an estate and is appointed guardian of one of the heirs, and in the latter capacity gives a receipt to himself as administrator without actually having received as guardian the moneys so receipted for, such receipt is not binding on his sureties as such guardian, nor does it discharge his sureties as administrator. (Mo.) *In re Switzer*, 731.

Note.

Guardians, appeals by, and the right to prosecute, 756.

HABEAS CORPUS.

1. **HABEAS CORPUS—Review of Judgment.**—A proceeding in habeas corpus to determine the legality of an imprisonment is in the nature of a civil action, and a judgment of an inferior court of record either remanding or discharging a prisoner in such proceeding is reviewable by the supreme court by writ of error. (Colo.) *Martin v. District Court*, 262.

2. **HABEAS CORPUS—Review of Judgment by Certiorari.**—The supreme court has constitutional power to issue its original writ of certiorari to review a judgment in a habeas corpus proceeding, whether it be civil or criminal, when such judgment is clearly in excess of the jurisdiction of the court rendering it. (Colo.) *Martin v. District Court*, 262.

3. **HABEAS CORPUS—Review of Voidable Judgment.**—A judgment sentencing a prisoner under an indeterminate sentence statute for a crime committed before such statute went into effect is not void, but at most voidable, and not reviewable by writ of habeas corpus. (Colo.) *Martin v. District Court*, 262.

4. **HABEAS CORPUS—Review of Voidable Judgment.**—A writ of habeas corpus will not issue to enable a court to review a judgment that is merely voidable, and it is only where the judgment of conviction is wholly void that a prisoner may be released on habeas corpus. (Colo.) *Martin v. District Court*, 262.

5. **HABEAS CORPUS—Excessive Judgments—Review.**—A merely excessive judgment of a court of general jurisdiction is not void ab initio because of the excess, but is good so far as the power of the court extends, and is invalid only as to the excess, and a person in custody under such sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as is within the power of the court to impose. (Colo.) *Martin v. District Court*, 262.

6. **HABEAS CORPUS—New Trial.**—A trial court has no jurisdiction to grant or entertain a motion for a new trial in habeas corpus proceedings. (Neb.) *State v. Shrader*, 913.

7. **HABEAS CORPUS—Remand to Custody.**—A prisoner given his liberty under habeas corpus proceedings may, upon reversal of the order by an appellate court, be remanded to custody. (Neb.) *State v. Shrader*, 913.

8. **HABEAS CORPUS**—Defective Complaint.—A prisoner will not be set at liberty by writ of habeas corpus simply because the complaint, on account of which he is held in custody, states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention. (Neb.) *State v. Shrader*, 918.

HOGS.

See Constitutional Law, 1.

HOMESTEADS.

See Dower, 3-6.

HOMICIDE.

1. **HOMICIDE**—Weakness of Mind.—It is not Competent to prove in a prosecution for murder that the defendant was of weak mind, when it is admitted that he is neither an idiot nor an insane person. (Ga.) *Rogers v. State*, 364.

2. **HOMICIDE**—Instruction as to Cooling Time.—Where the judge in a murder trial gives, in his general instructions to the jury, the section of the Penal Code embodying the law of voluntary manslaughter, which contains the general principles of the law of "cooling time," his failure to give a more specific instruction on the question is not error, in the absence of a request therefor. (Ga.) *Rogers v. State*, 364.

3. **HOMICIDE**—The Fact that a Woman is Unchaste does not justify her husband in slaying her, nor, in the absence of a sudden heat of passion resulting from adequate cause, reduce the homicide below the grade of murder. (Ga.) *Rogers v. State*, 364.

4. **HOMICIDE**—Reading Law to Jury.—The trial court is vested with a discretion to prevent counsel from reading to the jury a decision of the supreme court which is not applicable to the case on trial. (Ga.) *Rogers v. State*, 364.

5. **HOMICIDE**—Instructions.—On a trial for homicide a refusal to instruct the jury that it may consider the fact that, after the killing of the deceased, the defendant went to his home and on the next day voluntarily notified the sheriff that he would come in and give himself up, which he did, is not cured by a general instruction that flight, even when proved, may only be considered as a circumstance of guilt, and that the defendant must be acquitted unless shown by the evidence to be guilty beyond every reasonable doubt. (Miss.) *Bell v. State*, 722.

6. **HOMICIDE**—Instructions.—On a trial for homicide, a refusal to instruct the jury on the subject of reasonable doubt and dealing with the individual juror, to the effect that, before the jury can convict, the evidence must be so strong that it convinces each juror of defendant's guilt beyond every reasonable doubt, and that if a single juror has a reasonable doubt of defendant's guilt, the jury cannot convict, is not cured by a general instruction dealing with the jury as a whole and telling it in effect that the entire jury must entertain a reasonable doubt of guilt in order to acquit. (Miss.) *Bell v. State*, 722.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE**—Effect of Marriage at Common Law as to Wife's Chattels.—At common law, marriage amounts to an absolute

gift to the husband of all the goods, personal chattels and personal estate, of which the wife is actually or beneficially possessed at that time in her own right. (Ga.) Ellington v. Harris, 320.

2. **HUSBAND AND WIFE—Husband's Title to Chattels of Wife.** If title to the personal chattels of a wife has vested in her husband by virtue of his marital rights, they remain his property until the title thereto is divested in some legal method. (Ga.) Ellington v. Harris, 320.

3. **HUSBAND AND WIFE—Chattels of Wife—Investment of Proceeds of, in Land.**—If title to the personal chattels of the wife has vested in the husband by virtue of his marital rights, and he has sold such property and invested the proceeds in land, taking title in his own name, he is still exercising dominion over it as his own, and if no complete gift of such chattels or of the proceeds to the wife is shown prior to the investment in the land, the husband is the absolute owner thereof. (Ga.) Ellington v. Harris, 320.

4. **HUSBAND AND WIFE—Investment of Proceeds of Wife's Chattels in Land—Title of Husband and Divestment Thereof.**—If land has been bought by the husband with the proceeds of property acquired from his wife by virtue of his marital rights, and the title thereto taken in his own name, without prior gift of such property or the proceeds thereof to his wife, the land becomes the absolute property of the husband, and his title thereto cannot become divested by mere admissions made from time to time, in his lifetime, that it belonged to himself and his wife's heir, that he held half of it in trust for such heir, or the like. (Ga.) Ellington v. Harris, 320.

Note.

Husband and Wife. See Divorce.

INCEST.

1. **INDICTMENT FOR INCEST—Failure to Charge that the Other Party was a Woman.**—An indictment charging that J. D., a man, being the father of C. D., a girl, did have sexual intercourse with such C. D. is not defective in not charging that she was a woman, nor in failing to state her age. (Ala.) Dixon v. State, 57.

2. **INCEST.**—It is not Necessary to Sustain a Prosecution for Incest that the Female should have Reached the Age of Puberty. (Ala.) Dixon v. State, 57.

INFANTS.

INFANTS—Limitations—When not Continued by Marriage.—If a woman not yet of age executes a conveyance, but remains unmarried until more than a year after attaining her majority, she should have disaffirmed the conveyance before her marriage, or, at least, not having done so, the statute of limitations must be regarded as running against her notwithstanding her subsequent marriage. (Mo.) Priddy v. Boice, 762.

INHERITANCE TAX.

See Taxation, 2.

INJUNCTION.

1. **INJUNCTION Against Blasting.**—A property owner is entitled to an injunction against the continuance of blasting, by which rocks

are constantly thrown on his land, though he cannot show that the blasting has been negligently done. (Ala.) *Central Iron and Coal Co. v. Vandenheuk*, 102.

2. **INJUNCTION—Motion to Dissolve.**—New matter in an answer not responsive to the bill cannot be considered on a motion to dissolve the injunction. (Ala.) *Town of New Decatur v. Scharfenberg*, 81.

3. **INJUNCTION—Dissolving on Security Being Given.**—An injunction against the change of grade of a street without compensating an abutting property owner may be dissolved upon the making of a cash deposit by the municipality and the execution of a bond to cover probable damages. (Ala.) *Town of New Decatur v. Scharfenberg*, 81.

4. **INJUNCTION—Political Rights.**—A court of equity will not exercise its extraordinary power of injunction to protect a mere political, as distinguished from a civil, right. (Iowa) *United States Standard Voting Machine Co. v. Hobson*, 539.

See *Municipal Corporations*, 11-16; *Nuisance*, 2; *Waste*.

IN REM.

See *Judgments*, 6-7.

INSANITY.

INSANITY.—Belief in Spiritualism is not evidence of insanity. (Mich.) *O'Dell v. Goff*, 662.

See *Wills*.

INSTRUCTIONS.

See *Trial*, 6-9.

INSURANCE.

Life Insurance.

1. **INSURANCE, LIFE—Forced Marriage—Widow of Insured.**—If the insured was forced and coerced into marrying a woman, and never thereafter cohabited with, or even visited her, she is not his widow at his death within the terms of an insurance contract making the insurance payable to the "widow or other heirs" of the insured. (Miss.) *Grand Lodge Colored K. of P. v. Smith*, 719.

2. **INSURANCE, LIFE—Misrepresentations in Application—Waiver of by Insurer.**—If an applicant for life insurance knowingly and intentionally gives false answers concerning his past state of health, thereby rendering his policy void, the fact that both the agent who took the application and the physician making the examination knew such answers to be false and wrote them as given does not constitute a waiver, or estop the insurer from denying the truth of such answers. (Mich.) *Mudge v. Supreme Court, I. O. F.*, 686.

3. **INSURANCE, LIFE—Breach of Warranty—Sufficiency of Evidence.**—Although a life insurance policy makes the by-laws of the insurance company a part of the contract, its failure to offer them in evidence in an action on the policy is not ground for a reversal of the judgment against the insured, when the policy and a physician's examination and testimony are sufficient to show a breach of the contract of insurance. (Mich.) *Mudge v. Supreme Court, I. O. F.*, 686.

4. LIFE INSURANCE—Vested Rights of Beneficiary.—In ordinary life insurance, where no power of divestiture or to change the beneficiary is reserved in the policy, the issuance of a policy confers a vested right upon the beneficiary named, and the insured cannot transfer such interest to any other person without the beneficiary's consent. (Ga.) *Perry v. Tweedy*, 393.

5. LIFE INSURANCE—Rights of Heir to Beneficiary.—Where a husband designates his wife as beneficiary in his life insurance policy, and she dies before he does, her vested interest in the policy is a part of her estate, and those entitled to share in her personal property at the time of her death under the law of succession will be entitled to share in the proceeds of the policy on his death. (Ga.) *Perry v. Tweedy*, 393.

6. LIFE INSURANCE—Vested Rights of Beneficiary.—In regard to the vested rights of the beneficiary, there is a difference between a certificate of membership in a mutual benefit association and an ordinary life insurance policy. (Ga.) *Perry v. Tweedy*, 393.

Accident Insurance.

7. INSURANCE, ACCIDENT—Roadbed of Railroad.—A provision of an accident insurance policy exempting the insurer from liability when the injury is received while the assured is on the roadbed of a railroad company, applies where he is injured while walking between the double tracks of a railroad used for running trains in opposite directions, the rails being ten feet apart on the inside of the tracks and the distance between passing engines being four feet. (Iowa) *McClure v. Great Western Accident Assn.*, 598.

Mutual Benefit Insurance.

8. MUTUAL INSURANCE—Failure to Pay Dues.—A benefit certificate which provides that for a nonpayment of dues the member shall be suspended and his right forfeited, but which also provides for his reinstatement on specified conditions, does not contemplate that a failure to pay dues will ipso facto work a forfeiture without affirmative action by the association. (Iowa) *Brooks v. Conservative Life Ins. Co.*, 560.

Fire Insurance.

9. INSURANCE—Violation of Condition by Tenant.—The violation by a tenant of the insured of a condition in a fire insurance policy against storing seed cotton on the premises avoids the policy, although the landlord has no notice of such storage. (Ga.) *Edwards v. Farmers' Mutual Assn.*, 385.

10. INSURANCE—Violation of Condition by Tenant.—Notice to an insurer of a dwelling-house that the insured has let the premises to a tenant does not constitute notice of a violation by the tenant of a condition in the policy against storing seed-cotton in the house or operate as a waiver of the forfeiture resulting therefrom. (Ga.) *Edwards v. Farmers' Mut. Ins. Assn.*, 385.

11. INSURANCE, Change of Interest or Possession, What is not. An agreement for the sale and purchase of real property amounting only to an option to purchase, and under which the insured remains entitled to free access to the property and its management in every respect as though all work done thereunder by the option-holder were being done by the assured, and that if the purchase money is not paid within a time specified, all payments made on the purchase price shall be forfeited, does not constitute a breach of condi-

tion against a change of interest or possession of the insured premises. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

12. **INSURANCE—Watchman, When not Required to be Kept at Night.**—If an insurance policy contains a permission for the works to remain idle, accompanied by a warranty by the assured "that at all times when the above works are idle and inoperative, one or more watchmen shall be kept constantly on duty at night," the assured is not required to keep a watchman at night when the works are operated during the day. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

13. **INSURANCE—Property Insured, When not Deemed Idle or Inoperative.**—If the insured property consisted of a smelter, and a furnace was subsequently placed therein by permission of the insurer and was in full operation, requiring the working of five or six men, and in connection with it one of the boilers and also the tools and water-pipes on the premises, and the buildings were occupied for the storage of ores and other materials, the premises were not idle and unoccupied within the meaning of a condition in the policy against them being idle, and unoccupied, though four boilers therein were not in use, nor were other parts of the buildings used except as above stated. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

14. **INSURANCE—Forfeiture by Breach of Condition Against Premises Being Idle and Unoccupied.**—Forfeitures are not favored. Hence it is not necessary to avoid a breach of a condition against the insured premises being idle and unoccupied that the works insured be kept in full operation, nor that all the furnaces in the insured smelter should be kept going every day. Nor is it material that the only furnace used was one constructed after the insurance was effected, if its construction was consented to by the insurer, who received compensation for the increased risk. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

15. **INSURANCE—The Iron-safe Clause in a Policy of Insurance is upheld as a reasonable contract of limitation on the risk which should be properly borne by the insurer.** (N. C.) *Coggins v. Aetna Ins. Co.*, 924.

16. **INSURANCE—In Construing the Iron-safe Clause, it should receive a reasonable interpretation, and only substantial compliance should be required.** (N. C.) *Coggins v. Aetna Ins. Co.*, 924.

17. **INSURANCE—Breach of the Condition Requiring an Inventory to be Kept.**—Where, if the assured furnished all the data in his possession, but from such data it is not possible to supply the information required to make an inventory of the goods in his store, there can be no doubt that he has not complied with the condition in his policy requiring him to take a complete, itemized inventory of stock on hand at least twice in each year. (N. C.) *Coggins v. Aetna Ins. Co.*, 924.

Entirety of Contract.

18. **INSURANCE, Entirety of Contract.**—Where the Building and Goods Therein are insured against loss by fire, and the policy contains what is known as the iron-safe clause and the clause requiring the keeping of an inventory, and there is such a breach that the insured is not entitled to recover for the loss of the goods, he is precluded as well from recovering from the destruction of the building, though, in the policy, the premium being entire, there is a definite sum specified for the building and another for the goods. (N. C.) *Coggins v. Aetna Ins. Co.*, 924.

19. INSURANCE, Test of the Entirety of a Contract of.—Where the premium paid is entire, and every risk which can attend the one class of property also attends the other, the same rule must be applied to both, and the breach of condition as to one class of property precluding a recovery for its loss also precludes a recovery on account of the property of the other class. (N. C.) *Coggins v. Aetna Ins. Co.*, 924.

20. INSURANCE, Severability of.—Whether a Contract is Entire or Severable is a Question of Intention to be determined from the language employed by the parties in the light of all the circumstances surrounding them at the time they contracted. (Cal.) *Goorberg v. Western Assur. Co.*, 246.

21. INSURANCE—Breach of Condition, When does not Avoid Policy as to All the Subjects Insured.—Where the property insured is so placed that the risk on each item is separate and distinct, so that what affects the risk on one does not affect the risk on the others, the policy is divisible. (Cal.) *Goorberg v. Western Assur. Co.*, 246.

22. INSURANCE, Severability of not Controlled by the Entirety of the Premium.—The mere fact that the premium paid for insuring distinct articles of property is entire does not conclusively establish that the contract of insurance is not severable. (Cal.) *Goorberg v. Western Assur. Co.*, 246.

23. INSURANCE of Building and Furniture Therein, Entirety of. If a Building and the Furniture Therein are Insured, and there is a breach of condition respecting the title to the building, this relieves the insurer from liability for the furniture, for, as the breach of the condition increases the hazard as to the building, it must also be presumed to have increased the hazard as to the furniture therein. (Cal.) *Goorberg v. Western Assur. Co.*, 246.

Waiver and Estoppel.

24. INSURANCE, Waiver of Conditions by Agents.—Stipulations and conditions in a policy regarding the powers of agents and the manner of waiving conditions do not preclude a waiver by the conduct of authorized agents in regard to future operations on the premises, though the waiver is by parol or in other respects not made in the form provided for in the policy. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

25. INSURANCE—Power of General Agents to Waive Conditions. Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the insurers themselves. This rule includes all persons empowered to conclude contracts of insurance without first referring negotiations to their principals. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

26. INSURANCE AGENTS, Power of to Make New Contracts.—General agents of insurance companies have power to make new contracts. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

27. INSURANCE.—Subsequent Parol Waivers by a General Agent are valid though the policy requires them to be, and they are not, in writing. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

28. INSURANCE—Waivers, Failure to Indorse on Policies.—If an insured applies for leave to make a change in the condition of the property insured increasing the hazard, and is granted such leave by a general agent on paying an additional sum on account of the increase, a new contract is upon such payment created and precludes the insurer, though the waiver is not indorsed on the policy

as stipulated for therein and it provides that waivers not so indorsed shall be void. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

29. **INSURANCE—Estoppel.**—Where an insurer acting by its agents authorized to make new contracts in its behalf receives an additional premium as consideration for assenting to an increase in the risk, but fails to indorse the new agreement or consent on the policy as required therein, the fault being that of the insurer, it is estopped from relying on such fault for the purpose of avoiding the policy and resisting a recovery thereon. (Cal.) *Mackintosh v. Agricultural Fire Ins. Co.*, 234.

30. **INSURANCE—Breach of Condition, When not Waived by Failure to Return Premium After Loss.**—If an insurer, after a loss, having knowledge of the breach of a condition, denies liability, but does not offer to return the premium received, it does not thereby waive its right to defend on account of such breach. (Cal.) *Goorberg v. Western Assur. Co.*, 246.

31. **INSURANCE—Waiver of Breach of Condition, Failure to Plead.**—If a complaint to recover insurance shows the breach of a condition, but avers the issuing of a policy with knowledge of the facts constituting such breach, and does not allege a waiver resulting from the retention of the premium after the loss occurred, this latter waiver is not admissible under this pleading. (Cal.) *Goorberg v. Western Assur. Co.*, 234.

32. **INSURANCE—Inconsistent Position on Appeal.**—When an action to recover on an insurance contract is tried on the theory that the policy has been forfeited but the forfeiture waived, the issue of nonforfeiture cannot be made on appeal. (Ark.) *Industrial Mut. Co. v. Thompson*, 149.

33. **INSURANCE—Waiver of Forfeiture by Agent.**—A superintendent of agencies authorized to settle and adjust claims against his company has authority to waive a forfeiture for nonpayment of premiums, notwithstanding an express condition of the policy that a waiver can be effected only in writing signed by the president or secretary. (Ark.) *Industrial Mut. Ind. Co. v. Thompson*, 149.

34. **INSURANCE—Waiver of Forfeiture by Making Settlement.**—When the representative of an insurance company settles a claim by paying a part of the loss, he thereby waives a prior forfeiture. (Ark.) *Industrial Mut. Ind. Co. v. Thompson*, 149.

Fraudulent Settlement.

35. **INSURANCE—Fraudulent Settlement of Claim.**—A receipt fraudulently procured from an insured in full acquittance of her claim does not bind her. (Ark.) *Industrial Mut. Ind. Co. v. Thompson*, 149.

36. **INSURANCE—Fraudulent Settlement—Return of Amount Received.**—Where an insurance company has procured the settlement of a claim through fraud, the insured is not required to tender the amount she has received under such settlement as a prerequisite to a suit on her policy. The jury may make the proper deduction in their verdict. (Ark.) *Industrial Mut. Ind. Co. v. Thompson*, 149.

INTERSTATE COMMERCE.

See Attachment, 9.

INTOXICATING LIQUORS.

1. **LIQUOR—What Amounts to Sale Without License.**—Where A, after refusing to sell, but offering to loan, whisky to B, delivers two

bottles to him, and an hour or two later B returns and hands A the amount which the liquor cost, directing A when he makes another order for whisky to get B some and keep it in place of what B has obtained, the transaction amounts to a sale. (Ark.) State v. Brown, 109.

2. INTOXICATING LIQUORS.—The Right to Engage in that Business of Selling intoxicating liquors by retail is not now a common right, and can be exercised only under the terms prescribed by the statute. (Ill.) South Shore Country Club v. People, 417.

3. INTOXICATING LIQUORS.—A Dramshop as Defined by the Statutes of Illinois is "a place where spirituous, vinous or malt liquors are retailed by less quantities than one gallon." The legislature had the right to make this definition, and the courts are bound by it. (Ill.) South Shore Country Club v. People, 417.

4. INTOXICATING LIQUORS—Dramshops, Social Clubs, When Must be Held to be.—An incorporated social club formed in good faith, not for profit, but for pleasure, social recreation and the promotion of outdoor sports, if liquors are sold therein in less quantity than one gallon, is, under the statutes of Illinois, a dramshop, though such sales are made only to regular members and their guests, and the membership is limited. (Ill.) South Shore Country Club v. People, 417.

5. INTOXICATING LIQUORS, Sale of by Social Clubs.—If an incorporated social club formed, not for profit, but for pleasure, social recreation and the promotion of outdoor sports keeps a stock of intoxicating liquors in its clubhouse, which it furnishes only to its members and the guests accompanying them upon the written order of a member, he being charged with the liquor upon bills rendered semi-monthly and making payment accordingly, the charge being no more than the amount paid by the club for the liquor and service, but greater than the charge for similar supplies in places patronized by the public, such club is guilty of maintaining a dramshop, and must take out and pay for a license accordingly. (Ill.) South Shore Country Club v. People, 417.

6. INTOXICATING LIQUORS—Dramshops—Under the Statutes of Illinois an Incorporated Social Club Must be Declared a Dramshop, though its main purpose is social pleasure and not the making of money, whether the liquor is sold as an incident to the main purpose or otherwise, and although the public generally are not admitted. (Ill.) South Shore Country Club v. People, 417.

JOINT TORTS.

See Release.

JUDGES.

JUDGE—Waiver of Objections to.—Where a defendant makes no objection to a special judge, or to the regularity of his appointment, until after the issues are closed, he will be deemed to have waived his objections. (Ind.) Whitesell v. Strickler, 524.

JUDGMENTS.

Validity and Relief.

1. JUDGMENTS—Validity Jurisdiction. A judgment rendered by a court without jurisdiction of the parties is absolutely void, and the supreme court stands upon no higher or different footing in this

regard than a court of inferior jurisdiction. (Neb.) *Omaha Nat. Bank v. Robinson*, 903.

2. **JUDGMENTS—Fraud in Obtaining Relief from.**—A judgment which is the result of a fraud perpetrated upon the court by a false representation of jurisdictional facts may be set aside in the same court rendering it, in a proper proceeding instituted therein for that purpose. (Ga.) *Davis v. Albritton*, 352.

Res Judicata.

See Search-warrants.

3. **JUDGMENTS—Res Judicata.**—A person though not technically a party to a prior judgment, may nevertheless have been so connected with it by his interest in the result of the litigation, and his active participation therein, as to be bound by such judgment. (Mont.) *Pew v. Johnson*, 852.

4. **RES JUDICATA.**—The Judgment in a Former Action settles all matters of controversy involved in the issues between the parties; that is, all matters litigated, or which might have been litigated within the issues as they were made or tendered by the pleadings, but not matters which might have been litigated under such issues formed by additional pleadings. (Ind.) *Whitesell v. Strickler*, 524.

5. **RES JUDICATA.**—Where Two or More Defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading. (Ind.) *Whitesell v. Strickler*, 524.

Proceeding in Rem.

6. **JUDGMENTS IN REM** Need not Give Claimants Further Time to Assert Their Rights.—It is not essential under the constitutions in force in the United States to the cutting off of unnamed persons by a judicial proceeding, that the adjudication against them be made final only upon their failure to come in and assert their rights within a specified time after the entry of the judgment or decree. (Cal.) *Title and Document etc. Co. v. Kerrigan*, 199.

7. **A PROCEEDING** is Quasi in Rem when its purpose is to affect the interest of the defendant in specific real property within the state which has at the outset of the proceeding been brought within the control of the court. (Cal.) *Title and Document etc. Co. v. Kerrigan*, 199.

See Limitation of Actions; Partition, 4.

Note.

Judgments, based on gambling contracts, 180.

JURISDICTION.

See Venue.

LANDLORD AND TENANT.

1. **A LANDLORD** cannot Claim a Lien on the crop of his tenant as for supplies furnished the tenant when the landlord did nothing more than to become surety for the tenant for the payment of a horse. (Ark.) *Kaufman v. Underwood*, 121.

2. **LANDLORD AND TENANT—Fire-escape, Duty of the Former to Provide.**—Under a statute declaring that "the owner, proprietor, lessee or keeper of every hotel which is of the height of three

or more stories shall provide such structure with a fire-escape," the owner, as well as the lessee, may be held liable for the death of a guest in a leased hotel due to the absence of such an escape. (Mo.) Yall v. Snow, 781.

3. LANDLORD AND TENANT—Fire-escapes.—Failure to Allege that the Building was Built to be Occupied by a Hotel is not material where the complaint to recover for the death of a person claimed to be due to the absence of a fire-escape avers that the defendant leased the house as a hotel, and that it was conducted as a hotel by his tenants. (Mo.) Yall v. Snow, 781.

4. LANDLORD AND TENANT.—The Liability of a Landlord for Injuries Due to the Absence of a Fire-escape on a Building Used as a Hotel cannot be avoided by showing that it was leased before the statute required such fire-escape, and the landlord, therefore, had not a right of entry or control of the building to construct and provide such escape. (Mo.) Yall v. Snow, 781.

Note.

Landlord and Tenant, lien of landlord, advances made by third persons, when secured by, 130.

lien of landlord, advances secured by, what are, 130, 131.

lien of landlord, after-acquired property, whether subject to, 124, 125.

lien of landlord, agreements, when create, 123.

lien of landlord, choses in action, whether subject to, 129.

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lien of landlord, subtenants, when bound by agreements creating, 124.

lien of landlord, statutes creating, 126.

lien of landlord, third persons, property of, when subject to, 124, 128.

lien of landlord, time when attaches, 126.

lien of landlord, what debts protected by, 129.

LARCENY.

1. **LARCENY.**—One Who Solicits and Receives money at a public meeting in a church, with the intent to appropriate it to his own use, and falsely representing to the contributors that it is to be used for a certain benevolent purpose, is guilty of larceny. (Ind.) *Towns v. State*, 501.

2. **LARCENY.**—Dogs are subjects of larceny. (Ark.) *State v. Soward*, 136.

3. **LARCENY OF FIXTURES.**—One who by his wrongful acts converts a fixture into personal property, and then with larcenous intent forthwith carries it away without the consent of the owner, may be rightfully convicted of larceny. (Neb.) *Junod v. State*, 890.

4. **LARCENY.**—Wire fastened to posts for fencing a portion of the public domain for temporary use as a pasture is personal property, and one who removes it and carries it away without the consent of the owner, and with intent to steal it, is guilty of larceny. (Neb.) *Junod v. State*, 890.

5. **CRIMINAL LAW—Stealing Cattle.**—If one takes into his possession a calf found running at large with intent to steal it, and thus convert it to his own use against the owner's consent, thereby permanently depriving him of his property, he is guilty of the statutory crime of cattle-stealing. (Neb.) *Crockford v. State*, 876.

See Venue, 3.

LEASES.

See Landlord and Tenant; Railroads, 2-4.

LICENSEES.

See Negligence, 7-10.

LIENS.

LIEN FOR LABOR—Laborer, Who is.—A person employed in a store, whose duties require him to attend the bar, wash bottles and glasses, sweep out and dust the store, unpack goods, keep the books, and do anything else that is required of him, is a laborer, and entitled to a laborer's lien upon the property of his employer. (Ga.) *Bluthenthal v. Bennefield*, 350.

See Corporations, 17; Landlord and Tenant, 1; Mechanics' Liens; Vendor and Vendee, 516.

Note.

Lien. See Landlord and Tenant.

LIMITATION OF ACTIONS.

1. **LIMITATION OF ACTIONS—Fraudulent Concealment.**—Acts constituting fraudulent concealment may precede or be concurrent with or subsequent to, the accruing of the cause of action. It is important only that they are of a character, and designed to operate after the cause of action shall arise, to prevent its discovery. (Ind.) *Whitesell v. Strickler*, 524.

2. LIMITATIONS—Revival of Judgment by New Promise.—A judgment is, without regard to the cause of action on which it is founded, a debt ex contractu which, when barred by the statute of limitations, may be revived by a new promise. (Iowa) Spilde v. Johnson, 578.

3. JURY TRIAL—Error in Refusing Charge Respecting the Limitation of Actions.—It is reversible error to refuse to instruct a jury that the plaintiff cannot recover damages accruing more than one year prior to the commencement of the action when the statute of limitations restricts the recovery to such year. (Ala.) Tutwiler Coal etc. Co. v. Nichols, 34.

See Adverse Possession.

LIVERY-STABLES.

See Municipal Corporations, 1.

MANDAMUS.

1. MANDAMUS—Action Against State or Its Agents.—A state cannot be sued without its consent. A litigant cannot evade this rule by bringing an action in mandamus against the servants or agents of the state to enforce satisfaction for a claim payable out of state funds. (Iowa) Wilson v. Louisiana Purchase Exp. Com., 646.

2. MANDAMUS—Action Against State or Agents.—A state cannot be sued without its consent, and a writ of mandamus will not issue to compel state officers or agents to do an act involving discretionary or judicial determination of the question involved. (Iowa) Wilson v. Louisiana Purchase Exp. Com., 646.

3. MANDAMUS will not Issue to compel the state to execute a contract made by it. (Iowa) Wilson v. Louisiana Purchase Exp. Com., 646.

4. MANDAMUS will not lie to compel the allowance of a rejected or disputed claim against the state. (Iowa) Wilson v. Louisiana Purchase Exp. Com., 646.

MARRIAGE.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT—Risks of Defects, When Assumed—Promise to Repair.—If an employé knows of defects in an appliance which he is operating, he must be deemed to assume the risks unless there was such a complaint and promise to repair as relieve him from such risk. (Ill.) Morden Frog and Crossing Works v. Fries, 428.

2. MASTER AND SERVANT.—By the Promise of the Master to Repair a Defect of Which the Servant has Complained, a new relation is created, by which the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following the promise. (Ill.) Morden Frog and Crossing Works v. Fries, 428.

3. MASTER AND SERVANT.—The Complaint by a Servant of a Defect in Some Appliance He is Required to Operate Must be on Account of Some Danger Apprehended to Himself to relieve him from the assumption of the risk of its future operation, but the complaint will be presumed to have been because of such apprehension when it does not appear to have been made in the interest of the master,

nor because the machine did not do good work on account of the defect. (Ill.) *Morden Frog and Crossing Works v. Fries*, 428.

4. **MASTER AND SERVANT**—Notice of Intention to Quit Unless Defect is Remedied, When not Necessary.—An employé who complains of a defect in an appliance on account of danger apprehended to himself need not inform the master of his intention to quit work unless the danger is remedied, but such intention, though not announced, must have existed. (Ill.) *Morden Frog and Crossing Works v. Fries*, 428.

5. **MASTER AND SERVANT**—Machine, When not so Simple that the Defendant must be Presumed to Have Assumed the Risk of Use After Complaint and Promise to Repair.—A shearing and punching machine used for punching holes in iron or steel plates cannot be held to be a machine of which the operating servant has the same knowledge and comprehension as of a simple tool or implement, so that his continuing to operate it after a complaint and promise to repair precludes his recovery for subsequent injury therefrom. (Ill.) *Morden Frog and Crossing Works v. Fries*, 428.

6. **RAILROADS**—Injury to Employé on Track—Presumption of Negligence.—Where a railway employé riding on a handcar is struck by a train, a presumption of negligence arises against the railway company, casting the burden upon it to show that a constant lookout was kept. (Ark.) *St. Louis etc. Ry. Co. v. Graham*, 112.

7. **A MASTER** is Liable for the Willful Torts of his servant committed in the course of the servant's employment, just as though the master had himself committed them. (Ga.) *Columbus R. R. Co. v. Woolfolk*, 404.

Note.

Master and Servant, contributory negligence in continuing in service after promise to repair dangerous machinery, 442.

dangerous machinery, care to be exercised by employé after promise to repair, 438.

dangerous machinery, care to be exercised by servant notwithstanding a promise to repair, 438.

dangerous machinery, notice of defects in, when imputed to the master, 437.

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dangerous machinery, promise to repair, when sufficient, 438.

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Master and Servant, risks of dangerous machinery, when assumed by a servant, 434.

risks of dangerous machinery, which the master has promised to repair, 434.

MECHANICS' LIENS.

1. MECHANICS' LIENS.—Subcontractors are not Entitled to a Personal Judgment Against the Land Owner in a suit to enforce their claim against the land. (Cal.) Builders' Supply Depot v. O'Connor, 193.

2. MECHANICS' LIENS—Offsets.—In an Action by Subcontractors to enforce a mechanic's lien, damages for the failure of the original contractor to finish his work within the time specified in his contract may be deducted notwithstanding a statute providing that "as to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim in favor of the reputed owner and against the contractor." This clause relates to offsets not arising under the terms of the contract and as to which, from an inspection of the contract, materialmen and laborers could have no notice. (Cal.) Builders' Supply Depot v. O'Connor, 193.

3. MECHANICS' LIENS—Constitutional Law.—A Statute Allowing Attorneys' Fees in suits to foreclose mechanics' liens is unconstitutional and void when they are allowable in favor of plaintiffs only, and not allowable to them in other classes of actions. (Cal.) Builders' Supply Depot v. O'Connor, 193.

MORTGAGE.

Sale under Power.

1. MORTGAGE—Sale Under Extinguished Power.—Where a mortgage has been paid but the mortgagor has failed to have the satisfaction entered of record, a bona fide purchaser at a sale thereafter made under a power in the mortgage will be protected in his title. The mortgagee, however, is responsible to the mortgagor for whatever damages he sustains on account of the fraud. (Ga.) Garrett v. Crawford, 398.

2. MORTGAGE—Notice of Sale Under Power.—The statutes do not require a mortgagee to give notice to the mortgagor of an intention to exercise a power of sale contained in the mortgage; and when the instrument contains no provision for notice other than by advertisement in a certain way no other notice is necessary. (Ga.) Garrett v. Crawford, 398.

3. MORTGAGE—Time for Sale Under Power.—A sale under a power in a mortgage should be on a regular sale day, when there is nothing in the mortgage to indicate what was the intention of the parties as to the time of sale. (Ga.) Garrett v. Crawford, 398.

Redemption.

4. EXECUTION SALES—Right of Purchaser to Redeem from Foreclosure.—One who has, within the statutory period allowed for redemption from a foreclosure sale, acquired the mortgagor's title by an execution sale, has the same right to redeem from the foreclosure which the mortgagor might have exercised had his title not been divested by the intervening sale on execution. (Iowa) Kendig v. McCall, 594.

5. MORTGAGES—Foreclosure—Redemption—Remedies.—The statute providing a summary method of settling controversies as to the

right to redeem from foreclosure sales, or the amount to be paid, is not an exclusive remedy, and one who is entitled to redeem may tender the amount necessary to make redemption, and if his tender is refused, may assert his right in a court of equity without filing the affidavit provided for by such statute. (Iowa) *Kendig v. McCall*, 594.

See Chattel Mortgages; Guardian and Ward.

MUNICIPAL CORPORATIONS.

Livery-stable Ordinances.

1. **MUNICIPAL CORPORATIONS—Livery-stable Ordinances—Validity.**—A municipal ordinance requiring anyone desiring to engage in the livery-stable business to first obtain a permit from the city council, and the consent of a majority of the lot owners in the block, and exempting from its operation any livery-stable then in existence, is, as to one who has practically completed a livery-stable within the city limits, and made arrangements to operate it before the passage of the ordinance, void and inoperative as an unlawful discrimination between himself and others engaged in the same business at the time of the enactment of the ordinance. (Mont.) *City of Billings v. Cook*, 845.

Bonus to Railroad.

2. **MUNICIPAL CORPORATION—Bonus to Railroad.**—An appropriation of a sum of money by a town council to induce a railroad company to build its road into the municipality and establish a depot therein is void, under a constitutional provision that no municipal corporation shall appropriate money for, or loan its credit to, or become a stockholder in, any corporation, and cannot be ratified by an acceptance of benefits thereunder by the town. (Ark.) *Luxora v. Jonesboro etc. R. R. Co.*, 139.

3. **MUNICIPAL CORPORATION—Recovery of Money Illegally Paid to Railroad.**—A municipal corporation may recover money unlawfully appropriated and paid by its officers to a railroad company as an inducement to build its road into the municipality. (Ark.) *Luxora v. Jonesboro etc. R. R. Co.*, 139.

Contracts with City Officers.

4. **MUNICIPAL CORPORATIONS—Contracts with City Officers—Construction of Statute.**—A contract for the sale of merchandise to a city by a member of its council is not within a statute prohibiting a member of a city council from being or becoming interested in any contract or job for work, or the profits thereof, or services to be performed for the city. (Iowa) *Bay v. Davidson*, 650.

5. **MUNICIPAL CORPORATIONS—Contracts with City Officers.**—A contract for the sale of merchandise to a city by a member of its council is void, as violative of the law of agency, and contrary to public policy, although the city receives the benefits of the contract. (Iowa) *Bay v. Davidson*, 650.

Street Improvements and Assessments.

6. **MUNICIPAL CORPORATIONS—Street Improvements—Intended Benefits.**—Whatever benefit may accrue to abutting property owners as the result of a street improvement is purely an incident of the improvement, and not an object intentionally sought to be obtained by the contract made by the city for such improvement. The city owes no duty to the property owner to increase the value

of his property, and if that is done, it is an incidental result of the contract. (Mo.) *City of St. Louis v. G. H. Wright Contracting Co.*, 810.

7. **STREET ASSESSMENT**, Judgment Foreclosing has no Effect Against Owners not Parties Thereto.—A judgment purporting to foreclose a street assessment has no effect against the owners of the property not parties thereto, and their title is not divested by a sale thereunder. (Cal.) *Rixford v. Zeigler*, 229.

Change in Grade of Street.

8. **MUNICIPAL CORPORATIONS—Streets, Change of Grade of, Injunction to Prevent Until Compensation is Made.**—An injunction will issue to prevent a change of the grade of a street until compensation is first made, without reference to the solvency or insolvency of the municipality enjoined. (Ala.) *Town of New Decatur v. Scharfenberg*, 81.

9. **MUNICIPAL CORPORATIONS—Streets, Change of Grade of, Right to Compensation, When not Waived.**—By joining in a petition for the paving of a street in front of his property, an owner does not waive his right to damages which may result from a change of grade preparatory to such grading. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

10. **A MUNICIPALITY has the Right to Change the Grade of a Street** without compensating adjoining lot owners if no injury can result to their property. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

Injunctions against Change of Grade.

11. **INJUNCTION Against Change of Grade of Street.**—If an abutting property owner is or will be injured by a change of the grade of a street, he may restrain the further prosecution of the improvement of the street by a municipality until compensation is made to him for the injury done, or about to be done, to his abutting property. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

12. **MUNICIPAL CORPORATIONS.**—A mandatory injunction to restore a street to its former condition is proper, where the municipality has entered upon a change of grade without compensating an abutting property owner. (Ala.) *Town of New Decatur v. Scharfenberg*, 81.

13. **MUNICIPAL CORPORATIONS—Street Change of Grade of, Act Amounting to Waiver of Right to Injunction Against.**—A property owner who consents to a change of the grade of a street, and thereby induces a municipality to incur expenses in and about the work, cannot obtain an injunction against the doing thereof. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

14. **MUNICIPAL CORPORATIONS.**—A Mandatory Injunction to Compel the Restoration of a Street to Its Former Condition may issue, though there has been no negligence in or about the work. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

Obstruction to Street—Remedy of Abutting Owner.

15. **NUISANCE, PUBLIC, Special Damage or Injury, What Amounts to.**—A public nuisance which forces the owner of land out of his direct public street or road into a circuitous route, in his commerce and intercourse with the outside world, is a peculiar and special injury to him not suffered by the general inhabitants of the

city, county or state, and entitles him to maintain a suit to abate it. (Ala.) *Gloss-Sheffield Steel etc. Co. v. Johnson*, 89.

16. INJUNCTION Against a Public Nuisance, Remedy at Law, When not Adequate.—A property owner whose access to his property is obstructed by a nuisance on a public street requiring him to take a circuitous route to reach such property has not an adequate remedy at law, and is therefore entitled to relief in equity. (Ala.) *Gloss-Sheffield Steel etc. Co. v. Johnson*, 89.

Liability for Acts of Officers—Care of Streets.

17. MUNICIPAL CORPORATIONS—Duties and Liability.—In the discharge of its functions a municipality is called upon to perform duties of two classes, the one political and governmental, and the other private and corporate, and its liability or nonliability for damages depends upon the character of the duty performed, rather than upon the department, officer or agent of the corporation by whom the duty is performed. (Colo.) *City of Denver v. Davis*, 293.

18. MUNICIPAL CORPORATIONS—Liability for Acts of Officers.—A municipality is not liable for the acts of its officers or agents of the departments of health, police, or fire, while in the performance of public governmental functions, and duties connected with, and appertaining to, such departments. (Colo.) *City of Denver v. Davis*, 293.

19. MUNICIPAL CORPORATIONS.—Dumping Grounds maintained by a city for waste material collected by the city and private teams from the streets, alleys, and other public and private places in the city are for the convenience and benefit of the inhabitants of the city, and an adjunct to the street cleaning department of the city, their maintenance not being the discharge of any public duty imposed upon the city by the state, but the exercise of a municipal function by the city, in its private and corporate capacity. (Colo.) *City of Denver v. Davis*, 293.

20. MUNICIPAL CORPORATIONS—Neglect in Care of Streets—Liability—The superintendence and care of the streets and alleys of a city, and all that directly pertain thereto, are peculiarly in the class of municipal duties, for the neglect of which the city, in its corporate capacity, is liable. (Colo.) *City of Denver v. Davis*, 293.

21. MUNICIPAL CORPORATIONS—Dumping Grounds—Negligence—Liability.—The maintenance of a dumping ground for waste material collected by the city from its streets and alleys and private premises in the city, is merely the exercise of a municipal function by the city in its private and corporate capacity for the benefit and convenience of itself and its inhabitants, and if such dumping ground is in the charge of, and under the supervision of, the city health commissioner and his agents, the city is liable for their negligence in allowing a fire to spread therefrom and destroy the property in the vicinity. (Colo.) *City of Denver v. Davis*, 293.

See *Contracts*, 4-6.

MURDER.

See *Homicide*.

NEGLIGENCE.

In General.

1. **NEGLIGENCE** is Want of Ordinary or Reasonable Care in respect to that which it is the duty of the party to do or to leave undone. (Penne.) Queen Anne's R. R. Co. v. Reed, 301.

2. **IMPUTED NEGLIGENCE.**—The Negligence of a Husband While Driving a vehicle is not imputable to his wife, who is riding with him. (Ga.) Southern Ry. Co. v. King, 390.

Contributory Negligence.

3. **NEGLIGENCE, CONTRIBUTORY.**—Burden of Proof to establish contributory negligence whenever it is relied upon as a defense rests upon the defendant, but proof of such negligence may arise out of the testimony of the plaintiff in the first instance. (Penne.) Queen Anne's R. R. Co. v. Reed, 301.

4. **NEGLIGENCE, CONTRIBUTORY.**—When Question of Fact.—The court will not decide a certain act to constitute contributory negligence as a question of law, although the weight of evidence may seem to be on one side or the other, if the testimony is conflicting, or if the conclusion to be drawn therefrom is doubtful or uncertain. Under such circumstances the determination of the question clearly falls within the province of the jury. (Penne.) Queen Anne's R. R. Co. v. Reed, 301.

5. **NEGLIGENCE, CONTRIBUTORY.**—When Question of Law.—If the evidence clearly shows contributory negligence proximately entering into, and clearly contributing to, the accident, at the time of its occurrence, the court must so find, as a matter of law. (Penne.) Queen Anne's R. R. Co. v. Reed, 301.

Duty to Provide Fire-escapes.

6. **OWNER OF BUILDING, Duty of to Provide Fire-escapes.**—At the common law, the owner of a building not particularly exposed to fire from the character of the work carried on in it was not bound to anticipate the probability of danger from fire, or that its occurrence would put in jeopardy the lives of his employees or tenants, and the law does not require, where the building was properly constructed for its intended use and purpose, the construction of fire-escapes, the ordinary means of escape by stairs, halls and doorways being deemed sufficient. (Mo.) Yall v. Snow, 781.

Duty to Licensees.

7. **NEGLIGENCE.**—A Bare Licensee Who Goes upon the Premises of another for some purpose with which the owner or occupant has no concern, and without any enticement, allurement, or inducement being held out to him by the owner or occupant, assumes the perils arising from defects arising in the premises. (Ind.) Baltimore etc. R. R. Co. v. Slaughter, 503.

8. **NEGLIGENCE.**—Invitation to Use Premises.—When the owner of land, by enticement, allurement, or inducement, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming. The enticement, allurement, or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's land by another is not sufficient, although the invitation may be inferred from some act or line of conduct, or from some designation or dedication. (Ind.) Baltimore etc. R. R. Co. v. Slaughter, 503.

9. **NEGLIGENCE—Invitation to Use Premises.**—The word "invitation," as used in reference to a license to enter the premises of another, includes not only an actual bidding, but also an allurement or enticement. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

10. **NEGLIGENCE—Invitation to Use Way.**—When an owner constructs a way over his premises in such a manner as apparently to be for the use of certain persons, with the intent that they shall use it, and they enjoy it for a considerable time, he owes to them the duty to exercise ordinary care for their safety while pursuing the privilege, so far as his own acts are concerned, and this is especially true as to a new and unapprehended danger. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

Pleading.

11. **NEGLIGENCE—Necessity of Specific Allegations.**—In complaints for negligence, it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion, not demurrer. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

12. **NEGLIGENCE—Frightening Team—Pleading.**—In an action for negligence in frightening a team by placing an object in or near a way, an averment in the complaint that the object was calculated to frighten horses of ordinary gentleness is unnecessary. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

13. **NEGLIGENCE—Pleading—Variance.**—Where a complaint alleges that a railroad company left a handcar in a farm crossing way, but the evidence shows that the car was left near the way, the variance is at most technical, and the defect will be treated as obviated by amendment. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

Evidence.

14. **NEGLIGENCE—Presumption of, from Accident.**—The mere fact of an accident by which an injury is sustained, if not within the control of the defendant, does not, of itself, raise a presumption of negligence. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

15. **NEGLIGENCE—Burden of Proof.**—Plaintiff must both allege and prove negligence on the part of the defendant to be entitled to a recovery, as the burden of proving negligence rests upon plaintiff. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

16. **NEGLIGENCE—How Determined.**—It is for the court to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

17. **NEGLIGENCE—When Question of Fact.**—If there is any evidence of negligence upon which the jury can properly find a verdict, or if the conclusion to be drawn therefrom is debatable, or rests in doubt, though the facts are undisputed, or if the evidence is conflicting in regard to any material fact, the question of negligence is one of fact for the determination of the jury. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

18. **NEGLIGENCE—Failure to Prove—Nonsuit.**—If plaintiff fails to produce any evidence of negligence on the part of defendant, or if no fair inference of negligence can be drawn from the evidence

favorable to plaintiff, the court must consult the plaintiff or direct a verdict for the defendant. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

See Sales, 23.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

Nota.

Negotiable Instruments, based on gambling considerations, presumption of bona fides of holders of, 178.

based on gambling considerations, securities taken, whether may be enforced, 178.

gambling considerations, whether affects in the hands of bona fide holders, 176, 177.

NEW TRIAL.

NEW TRIAL.—Where the Assignment of Ground for a new trial is joint, the applicants take upon themselves the burden of showing that all of the rulings embraced within a particular cause for a new trial are erroneous. (Ind.) *Heaston v. Krieg*, 475.

NOTARIES.

See Acknowledgments.

NUISANCE.

1. NUISANCE, PUBLIC—Injury to His Property Which will Sustain Suit by a Private Person.—If a property owner sustains an individual or specific damage in addition to that suffered by the public, he may sue to have a public nuisance abated, for his remedy at law is inadequate. (Ala.) *Gloss Sheffield Steel etc. Co. v. Johnson*, 89.

2. NUISANCE, PUBLIC.—The Special Damages Entitling a Property Owner to an Injunction Against a Public Nuisance must be different in kind and not merely in degree from that suffered by the general public. (Ala.) *Gloss Sheffield Steel etc. Co. v. Johnson*, 89.

See Constitutional Law, 1; Municipal Corporations, 15, 16.

PARTIES.

SUBSTITUTION OF PARTIES—Supplemental Pleading.—When a debtor, pending suit to set aside certain conveyances as fraudulent, is adjudged a bankrupt and a trustee is appointed, the trustee may be substituted as plaintiff without the filing of any additional pleading. (Iowa) *Crary v. Kurtz*, 549.

PARTITION.

1. PARTITION Notwithstanding Will to the Contrary.—If the owner of property makes a valid agreement not to dispose of his property by will, and subsequently, disregarding such agreement, undertakes to so dispose of it, one of his heirs at law, who, but for the will, would be entitled to an undivided interest in the property, may maintain a suit for its partition. (Ill.) *Jones v. Abbott*, 412.

2. **PARTITION, Estate Which is not Subject to.**—Under a statute giving a right of partition to one or more cotenants who have an estate of inheritance or for life or for years, a cotenant of the right to lay down and plant oysters in any public waters of the state has no more than a mere personal license, and hence cannot maintain a suit for partition. (Cal.) *Darbee etc. Land Co. v. Pacific Oyster Co.*, 227.

3. **PARTITION—Unsettled Estate of Decedent.**—The fact that an estate of a decedent is not fully settled is no defense to an action of partition. (Iowa) *Smith v. Smith*, 581.

4. **PARTITION—Judgment, Effect of as Against Child En Ventre Sa Mere.**—An unborn child not having been made a party, his rights are not cut off by a decree in partition to which his mother and sisters are the only parties and a sale thereunder, even in favor of an innocent purchaser. (N. C.) *Deal v. Sexton*, 943.

5. **PARTITION.**—Counsel Fees may be Taxed in partition proceedings when there is no dispute as to the ownership of the property and the respective shares to which the parties are entitled, although other matters are litigated. (Iowa) *Smith v. Smith*, 591.

See Receivers, 1.

Note.

Partition, child en ventre sa mere, whether and when bound by, 953, 956.

Partition of the Property of Decedents, before the settlement of their estates, 587, 588.

conflict of jurisdiction between courts of probate and other courts, 587.

debts, existence of does not prevent, 589.

debts, existence of will not be presumed for the purpose of preventing, 591.

delay of to give time to settle estates, 591, 593.

discretion of the court to prevent injustice in the enforcement of the right of, 592.

proceeds of sales in, when may be kept within the jurisdiction of the court, 592.

statutes requiring the estate to be settled, 590, 591.

suspending the right of until the debts of the decedent are paid, 593.

where wills remain subject to contest, 590.

where it consists of an undivided interest, 593.

PASSENGERS.

See Carriers.

PHYSICIANS AND SURGEONS.

1. **PHYSICIANS Compensation for Services to Unconscious Patient.**—Where surgeons operate upon an unconscious man whom they are called to attend by third persons, and who dies without regaining consciousness, the law implies a contract on his part to pay the reasonable value of their services. (Ark.) *Cotnam v. Wisdom*, 157.

2. **PHYSICIANS Compensation for Unsuccessful Operation.**—A surgeon who brings to an operation due skill and care earns the reasonable and customary price therefor, whether the outcome be beneficial to the patient or the reverse. (Ark.) *Cotnam v. Wisdom*, 157.

3. **PHYSICIANS—Compensation.**—The Financial Condition of a patient cannot be taken into consideration in estimating the value of his surgeon's services, if the patient was unconscious when the surgeon was called and never regained consciousness. (Ark.) *Cotnam v. Wisdom*, 157.

4. **PHYSICIANS—Compensation—Family Relationship.**—In an action for services rendered by surgeons on a patient who did not recover, evidence that he was a bachelor and that his estate went to his nieces and nephews is irrelevant on the issue as to the value of the services. (Ark.) *Cotnam v. Wisdom*, 157.

PLEADING.

In General.

1. **PLEADING.**—Certainty to a Common Intent is all that is necessary in construing a pleading. (Ala.) *Birmingham Ry. etc. Co. v. Adams*, 27.

2. **PLEADING—Demurrer United by Several Parties.**—When two or more parties desire to demur separately to the same pleading, on the same ground, the law does not require each to file a separate paper. If they choose, all may set separately in demurring, and yet unite in the same paper, provided that it is clearly stated therein that they act severally and not jointly. (Ind.) *Whitesell v. Strickler*, 524.

3. **APPEAL AND ERROR.** The setting down of a plea for hearing upon its sufficiency admits the truth of the facts alleged therein, for the purpose of obtaining a judgment of the court upon the legal question whether the facts constitute a defense. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

In Equity.

4. **PRACTICE IN EQUITY Verification of Plea.**—Unless some rule or statute requires it, the plea to a bill in equity need not be verified. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

5. **PRACTICE IN EQUITY.—A Bill is not Barred for Duplicitly** if it does not contain two independent facts nor two separate states of facts, each constituting a sufficient answer to the bill. (Ala.) *Town of New Decatur v. Scharfenberg*, 82.

Amendments.

6. **PLEADING—Amendment of Complaint, When not a Departure.** The amendment of a bill to enforce a vendor's lien seeking to make clear the lands intended to be conveyed by explaining the description contained in the deed is not a departure from the cause of action stated in the original bill. (Ala.) *Reynolds v. Lawrence*, 78.

7. **TRIAL—Amendment of Pleadings Discretion of Court.** The allowance of an amendment to the pleadings is within the sound legal discretion of the trial court. (Mont.) *Gehlert v. Quinn*, 864.

See Actions.

Note.

Presumption that voluntary conveyance is fraudulent as against creditors, 553.

PRINCIPAL AND AGENT.

PRINCIPAL AND AGENT. Knowledge of the Agent will not be Imputed to His Principal when it is such as it is the agent's duty

not to disclose it, nor when it is certain from his relation to the subject matter or his previous conduct that he will not disclose it, nor when the person claiming the benefit of the knowledge or notice or those whom he represents collude with the agent to cheat or defraud the principal. (Ala.) *Lea v. Iron Belt Mercantile Co.*, 93.

See Bills and Notes, 5-10.

PRINCIPAL AND SURETY.

See Guardian and Ward, 7, 8; Taxation, 4.

PROBATE PROCEEDINGS.

See Executors and Administrators; Wills.

PROCEEDINGS IN REM.

See Judgments, 6, 7.

PROCESS.

EVIDENCE—Presumption—Dating of Summons.—It is presumed that the clerk of a court did his duty and properly dated a summons, but such presumption is disputable. (Mont.) *Gehlert v. Quinn*, 864.

See Constitutional Law, 3; Corporations, 5.

PROMOTERS.

See Corporations, 8, 9.

QUIETING TITLE.

1. **ACTION to Determine Conflicting Claims of Title.**—Cross-complaint—If the defendant in an action to determine conflicting claims of title files a cross complaint averring title in himself, and asking that his title be quieted, and the plaintiff neither demurs nor moves to strike out, but, answering, goes to trial on the merits, the court may render a decree in defendant's favor quieting his title as prayed for by him. (Cal.) *Johnson v. Taylor*, 181.

2. **CHANCERY—Jurisdiction to Quiet Title.**—Courts of chancery may by statute be authorized to quiet title to property in the state without the personal service of process therein. (Cal.) *Title and Document etc. Co. v. Kerrigan*, 199.

3. **QUIETING TITLE, Operation of Decree in Rem.**—While a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent partakes of the nature of a judgment in rem. (Cal.) *Title and Document etc. Co. v. Kerrigan*, 199.

4. **JURISDICTION, Naming of Defendants not Essential to.**—It is not essential, in a statute quieting or establishing title, that any person be required to be named as a defendant in the title to the action. (Cal.) *Title and Document etc. Co. v. Kerrigan*, 199.

5. **CONSTITUTIONAL LAW—Unknown Claimants.** The power of the state to settle titles is not limited to settling them against persons named. To exercise this power to the fullest extent it is necessary that it should be made to operate on all interests, known and unknown. (Cal.) *Title and Document etc. Co. v. Kerrigan*, 199.

6. **CONSTITUTIONAL LAW—Unknown Claimants, Who may be Proceeded Against as.**—So far as substituted service of process upon a class of unknown claimants is permitted to all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity; but this necessity will not justify the omission of personal service upon all who can with reasonable diligence be ascertained and found. (Cal.) Title and Document etc. Co. v. Kerrigan, 199.

7. **SUITS TO DETERMINE TITLE, Diligence to Ascertain and Serve Known Claimants, When Required.**—If the evident purpose of a statute is to secure, as far as possible, actual notice of the proceeding thereunder to all known claimants, it must be construed as not intending to permit plaintiff to willfully or negligently close his eyes to means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. (Cal.) Title and Document etc. Co. v. Kerrigan, 199.

8. **CONSTITUTIONAL LAW—Establishing Title, Proceeding for, When Judicial.**—A proceeding for the establishment of title to real property, though no person is required to be named as a defendant and no allegation need be made that anyone denies or assails plaintiff's title, there being, however, a provision for notice to all persons interested in opposing plaintiff's application and an opportunity for them to come in and oppose it, is not so nonjudicial in character that jurisdiction over it may not be conferred on a court forbidden by the constitution to exercise other than judicial functions. (Cal.) Title and Document etc. Co. v. Kerrigan, 199.

9. **COURTS, Jurisdiction of to Quiet Title.**—If a title to real property is in fact good, but is not deducible of record, a court of equity may remedy such defect by a decree, although there is no absolute controversy as to the title. (Cal.) Title and Document etc. Co. v. Kerrigan, 199.

10. **CONSTITUTIONAL LAW—Special Legislation—Permissible Classification.**—The establishment and quieting of title to real property in case of the loss or destruction of public records by earthquake, fire or flood differs so materially from most actions as to justify the legislature in placing the proceeding in a class by itself and in adopting for it forms of proceeding and modes of serving process not permitted in other actions. (Cal.) Title and Document etc. Co. v. Kerrigan, 199.

RAILROADS.

Abandonment of Track—Rails as Fixtures.

1. **RAILROADS—Rails as Fixtures—Abandonment of Track.**—A land owner from whom a railroad right of way has been obtained cannot claim the rails and fastenings laid for the purpose of operating the road as being fixtures forming part of the land itself and not removable by the railroad company or its transferee, in the absence of evidence on the part of the latter to abandon to the land owner such rails and fastenings. (Ga.) Georgia R. R. & B. Co. v. Haas, 327.

Lease of Railway.

2. **RAILROADS—Lease of—Liability.**—If a railroad company makes a lease to, or licenses another to exercise its franchises, in whole or in part, without express legislative authority, it remains liable for the acts of the lessee or licensee in such operation. (Ga.) Georgia R. R. & B. Co. v. Haas, 327.

3. **RAILROADS—Lease of Franchise—Conversion—Liability of Lessor.**—If the lessee of a railroad company's property and franchises, while in the operation of the road as a common carrier, commits a conversion of property, the lessor is liable therefor. (Ga.) *Georgia R. R. & B. Co. v. Haas*, 327.

4. **RAILROADS—Lease of—Act of Lessee—Pleading.**—In an action against a railroad company to recover for the act of its lessee, it is the better pleading to allege whether the act complained of was committed by the lessee or by the lessor. (Ga.) *Georgia R. R. & B. Co. v. Haas*, 327.

Duty toward Persons on Track.

5. **RAILROADS—Lookout for Persons on Track.**—The requirement of the Arkansas statutes that railroad companies shall keep a constant lookout for persons on their tracks applies to tracks within their yards as well as elsewhere, and is for the benefit of their employes as well as others. (Ark.) *St. Louis etc. Ry. Co. v. Graham*, 112.

6. **RAILROADS.—A Sufficient Lookout for Persons on the Track** is not made out as a matter of law by evidence that a brakeman with a lantern was stationed on the tender of an engine which was backing up in the night-time at such speed that it could not stop short of fifty-five feet while the brakeman could not see over thirty feet. (Ark.) *St. Louis etc. Ry. Co. v. Graham*, 112.

7. **RAILROADS—Duty of Persons on Track to Keep Lookout.**—It is the absolute duty of a person on a handcar to keep a lookout for trains in both directions. But as he cannot look both ways at once, he may reasonably be permitted to pay closer attention to the point from which danger is expected than to the other, though never to the extent of relaxing attention from the other direction further than necessary to give the required attention to the direction of most imminent danger. (Ark.) *St. Louis etc. Ry. Co. v. Graham*, 112.

Crossings—Handcar Frightening Horses.

8. **RAILROAD CROSSING—Invitation to Use.**—Where a railroad company constructs approaches to its track, and lays plank between the rails, apparently for a farm crossing, and one who owns land on both sides thereof, and also his tenants, make use of the crossing, the railroad company will be deemed to have invited such use. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

9. **RAILROAD CROSSING—Handcar Frightening Team.**—A complaint alleging that the defendant railroad company constructed a wagon road across its track, that the plaintiff has used the road since its construction, and that the defendant negligently placed a handcar near the crossing which frightened the plaintiff's team, and caused it to run away, to plaintiff's injury, states a cause of action. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

10. **RAILROAD CROSSING—Handcar Frightening Team.**—A railroad company is liable for its negligence in placing a handcar, calculated to frighten ordinarily gentle horses, near a farm crossing. (Ind.) *Baltimore etc. R. R. Co. v. Slaughter*, 503.

Crossings—Duty toward Travelers.

11. **RAILROADS—Crossings—Place of Danger—Notice of.**—The law regards a railroad crossing as a place of danger, and its presence is notice to a person approaching or attempting to cross it of the danger of colliding with a passing train. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

12. RAILROADS—Crossings—Duty to Stop, Look, and Listen—Contributory Negligence.—A person approaching a railway crossing is required to stop, look and listen for an approaching train before venturing to cross, and if he fails to exercise such ordinary care, whatever danger he could thereby have discovered and avoided he incurs the peril of if he proceeds, and for an injury arising under such fault, is without a remedy, by reason of his contributory negligence. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

13. RAILROADS—Crossings—Obstructed View of—Duty to Stop, Look and Listen.—Although the view of the railroad is obstructed at a crossing, that fact does not relieve the traveler from the duty to look and listen for an approaching train, whether special or regular. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

14. RAILROADS—Crossings.—Rights of Railways at highway crossings are superior to those of a traveler upon the highway. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

15. RAILROADS—Crossings—Care to be Used.—The superior right of a railway company at a highway crossing does not relieve it from reasonable and ordinary caution to prevent accidents, and the degree of care necessary may be affected by obstructions which prevent the track from being seen as the train approaches. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

16. RAILROADS—Crossings—Care to be Used.—Both the traveler and the railroad company are charged with the same degree of care at a highway crossing, the one to avoid being injured, and the other to avoid inflicting injury, and the care to be exercised by each must be commensurate with the risk and danger involved. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

17. RAILROADS—Negligence at Crossings—Presumption.—A person attempting to cross a railroad track at a highway crossing, and being injured, is presumed to have exercised reasonable and ordinary care in doing so, and if he was negligent, in fact, it must be shown by positive evidence, or from the circumstances attending the accident. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

18. NEGLIGENCE, CONTRIBUTORY—Want of Care at Railroad Crossing.—A total absence of reasonable care and caution on the part of a traveler in approaching a railway crossing, in making no effort to ascertain whether a train is approaching, or to avoid the danger imminent at the time he attempts to make the crossing, is contributory negligence, which bars any recovery for an injury received. (Penne.) *Queen Anne's R. R. Co. v. Reed*, 301.

See Attachment, 7-9; Carriers; Master and Servant; Waters and Watercourses, 14.

RAPE.

1. CRIMINAL LAW—Carnal Knowledge of Pupil by Teacher—Instructions.—If, on a prosecution under a statute making it a felony for any person to defile any female under eighteen years of age while she remains in his care or custody to which she has been confided, it appears that the accused was a school teacher, and that the prosecutrix was his pupil, that he visited her home nights when her mother was asleep or away from home, and then had sexual intercourse with her, it is proper to refuse to instruct the jury that if defendant's visits were made with the knowledge and consent of the mother, it terminated, for the time, the relation of teacher and pupil, and that the accused should be acquitted. (Mo.) *State v. Oakes*, 792.

2. CRIMINAL LAW—Carnal Knowledge of Pupil by Teacher—Relation After School Hours.—The confidential relation of male teacher and female pupil exists as well after the pupil reaches home as it does in the schoolroom or during school hours, and the fact that sexual intercourse between them occurs at her home and after school hours does not exempt him from the penalty provided by statute for anyone who, to whose care, custody or protection, any female under the age of eighteen years shall have been confided, shall defile her by carnally knowing her while she remains in his care or custody. (Mo.) *State v. Oakes*, 792.

REASONABLE DOUBT.

See Criminal Law, 10, 11.

RECEIVERS.

1. PARTITION.—A Receiver may be Appointed in a suit for partition to take charge of the real estate and collect its rents and profits pending the litigation. (Ill.) *Jones v. Abbott*, 412.

2. CORPORATION, Receiver of, Recovery of is Limited to the Amount Necessary to Satisfy Its Creditors.—Where the receiver of an insolvent corporation sued another corporation, which had also become insolvent, claiming the right to recover on the ground that the corporation of which he is receiver sold almost its entire assets to the other corporation in consideration of the agreement that the purchasing corporation would pay the debts of the selling corporation and issue stock to the stockholders of the latter of a specified amount, such sale is a fraud on the creditors of the selling corporation, and such receiver, for their benefit, may maintain a suit in equity against the purchasing corporation in the hands of the receiver of another corporation and prove against it the value of the goods purchased, but is not entitled to receive more than will satisfy the creditors of the selling corporation. No recovery can be had on behalf of the stockholders beyond the amount necessary to satisfy the creditors, when such stockholders have participated in the benefit of the illegal transaction, and thereby estopped themselves from questioning it. (N. C.) *McIver v. Young Hardware Co.*, 970.

Note.

Receivers, appeals by, and the right to prosecute, 756.

RELEASE.

1. JOINT TORT-FEASORS—Effect of Release of One.—The satisfaction of a judgment against one of several joint tort-feasors bars an action against the others, although such release and satisfaction shows upon its face that it was not intended to release them. (Colo.) *Ducey v. Patterson*, 284.

2. JUDGMENTS—Satisfaction of as to One Joint Tort-feasor—Effect on All.—A stipulation between a judgment creditor and a portion of the judgment debtors, who are all joint tort-feasors, that a settlement has been made of all questions between them, and that the judgment is hereby satisfied and discharged as to such portion of the debtors, but not waived or canceled as to another joint judgment debtor, and that a writ of error may be dismissed, does not constitute a covenant not to sue, but is a release of the judgment as to all of the joint tort-feasors. (Colo.) *Ducey v. Patterson*, 284.

3. CONSTITUTIONAL LAW—Ex Post Facto Law.—A statute providing that a release of one or more joint debtors shall not release the remaining debtors does not apply to a release of a portion of the joint debtors under a judgment rendered before the statute went into effect, and which the unreleased judgment debtor has a right to have first satisfied out of the property of the released judgment debtors. To construe such statute to apply in such case would violate a constitutional provision "that no ex post facto law or retrospective in its operation, shall be passed by the General Assembly." (Colo.) *Ducey v. Patterson*, 284.

RES JUDICATA.

See Judgments, 3-5.

SALES.

In General.

1. **SALES.**—The Essence of a Sale is a transfer of property in a thing from the seller to the buyer for a price. (N. C.) *McIver v. Young Hardware Company*, 970.

2. **SALE.**—The Delivery of Goods to a Carrier to be transported to the buyer, according to the contract of sale, is a delivery to the buyer, so that their subsequent loss is his. (Ark.) *Main v. Jarrett*, 144.

3. **IN SALES BY SAMPLE** there is an Implied Warranty that the bulk shall be equal to the sample, and also where the goods are sold without opportunity for inspection, that they shall be at least merchantable. (N. C.) *E. F. Main Co. v. Field*, 956.

4. **SALE—Agreement Limiting Time Within Which the Purchaser Must Complain of Inferior Character of the Articles Furnished.**—It is probable that the limit of two days for the inspection of an article furnished will be held reasonable when the defects are of a character which would be disclosed by an ordinary inspection, but if the defects are latent, no such limitation will protect the seller. Under such circumstances, the buyer has a reasonable time in which to ascertain the quality of his purchase, and what is a reasonable time is a question of fact dependent upon the circumstances of each case, to be determined by the jury. (N. C.) *E. F. Main Co. v. Field*, 956.

5. **SALE—Failure to Notify the Seller by a Registered Letter of Defects in the Articles Sold.**—Though the contract of sale stipulates that if defects are found in the article sold, the purchaser must notify the seller by registered letter, it is not material that notice was not given by such letter, if it appears that the seller received the purchaser's communication and refused to take back the goods or remedy the trouble. (N. C.) *E. F. Main Co. v. Field*, 956.

6. **SALE, Evidence that Contract of was Obtained by False and Fraudulent Representations, When Sufficient.**—If the evidence tends to show that the goods were apparently all right and up to the sample, and that their appearance was such as was calculated to deceive, and that in fact the goods were worth nothing, and that the seller, being informed, refused to remedy the defects, such evidence sustains a finding or verdict that the contract was obtained by false and fraudulent representations. (N. C.) *E. F. Main Co. v. Field*, 956.

Rescission.

7. **SCALE, Right of Purchaser to Rescind.**—If goods are sold by sample, and on being supplied do not correspond with it and are of

no value, and the seller is notified of the defects and given an opportunity to remedy them, then the purchaser is entitled to rescind the sale. (N. C.) *E. F. Main Co. v. Field*, 956.

8. **RESCISSION of Sale of Chattels, Condition Required to Support.**—To authorize a rescission of the sale of chattels on the ground of fraud on the part of the vendee so that a recovery in detinue or trover can be supported, these things must be proved: 1. The purchaser must, at the time of the transaction, be insolvent or in failing circumstances; 2. The purchaser must have had either a preconceived design not to pay for the goods, or no reasonable expectation of being able to pay for them; 3. He must have intentionally concealed these facts or made a fraudulent representation in regard to them; 4. The sale must have been induced by the fraudulent representation or concealment. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

9. **RESCISSION—Burden of Proof.**—To sustain the rescission of a sale of goods on the ground of fraud on the part of the vendee, the seller must assume the burden of reasonably satisfying the jury of each of the requirements necessary to support the rescission. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

10. **RESCISSION OF SALE—Subvendee, What must do to Prevent.** Where a plaintiff seeking to recover goods sold by him offers evidence prima facie sufficient to authorize him to rescind the sale, a subvendee must assume the burden of proof that he purchased from the original vendee and paid value. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

11. **PURCHASER FOR VALUE, Who is.**—One who has paid in cash, in whole or in part, or taken property in payment of a debt, is a purchaser for value entitling him to resist the recovery of property on the ground that the original vendor is entitled to rescind the sale for fraud. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

12. **RESCISSION, Subvendee, When Cannot Resist.**—If a subvendee receives the property in secret trust for the original purchaser, such subvendee cannot resist the rescission of the original sale except on the same grounds that the original purchaser could have resisted it. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

13. **RESCISSION—Burden of Proof Respecting Notice of the Fraud.** If a subvendee resists a recovery by the original vendor on the ground that he is entitled to rescind the original sale for fraud, and proves that he purchased from the original vendee for value, the first vendor must assume the burden of proving that the subvendee, before he paid the consideration, had notice of the fraud or knowledge of facts putting him on inquiry, which, if diligently pursued, would have brought him to the knowledge of the plaintiff's claim. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

14. **RESCISSION of Sale for Fraud—Rights of Subvendees, When not Dependent on the Amount of the Consideration Paid by Them.**—If, in a suit by a vendor of property to recover it from a subvendee, the latter shows that he purchased for value, the amount paid by him is not material, provided he parts with a consideration of some value as distinguished from a merely good consideration. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

15. **RESCISSION of Sale on Account of Fraud.**—When there has been a regular course of business dealings between a vendor and his vendee consisting of sales of merchandise, and the former seeks to recover the property from a subvendee on the ground that the original sales have been rescinded for fraud, and there is no evidence to show under which purchase the property sought to be recovered was included,

it becomes necessary for the plaintiff to prove that he was entitled to rescind each and every purchase for fraud. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

16. **RESCISSION OF SALE, Right of not Waived by Demand for Payment.**—If a vendor is entitled to rescind a sale for fraud, he does not waive his right to so rescind by demanding the payment of the purchase price. (Ala.) *Pelham v. Chattahoochee Grocery Co.*, 19.

Fraudulent Sales in Bulk.

17. **FRAUDULENT CONVEYANCES**—Sales in Bulk Act—Chattel Mortgages.—A chattel mortgage upon a stock of goods is not a "sale, transfer, or assignment" thereof in bulk within the meaning of a statute relating to sales of goods in bulk and passed for the protection of creditors. (Mich.) *Hannah v. Richter Brewing Co.*, 674.

Conditional Sale.

18. **SALES, CONDITIONAL**—Remedy of Seller on Resale.—If the buyer of an animal gives as part of the purchase price a note stipulating that such animal shall remain the property of the seller until paid for, and the buyer is not engaged in the business of buying and selling such animals, and the seller did not sell to him for resale, nor authorize him to resell, the seller is not estopped from asserting title to the animal until the purchase price is paid, both as against the buyer and anyone claiming under him. (Miss.) *Watts v. Ainsworth*, 700.

19. **CONDITIONAL SALES**—Estoppel—Evidence—Declarations.—If a seller, in a conditional sale, is not estopped from asserting title, both as against the buyer and those claiming under him, evidence of a conversation between the seller and a third person, who had previously bought from the buyer and sold to the defendant, with respect to the balance due on the purchase price, is not admissible in an action by the seller to recover the goods sold. (Miss.) *Watts v. Ainsworth*, 700.

20. **ASSIGNMENT OF NOTE for Purchase Money of Personalty.**—The assignment of a note without recourse, given for the purchase money of personalty, the title being retained in the seller until the purchase money is paid, does not extinguish the security, but the assignee is subrogated to the title, which was vested in the original seller until the purchase money is paid. (Ga.) *Townsend v. Southern Product Co.*, 340.

21. **SALES**—Retention of Title in Seller—Liens.—A retention of the title in the seller of personalty until the purchase price is paid, while affording a means of security, is not a lien. (Ga.) *Townsend v. Southern Product Co.*, 340.

22. **SALES**—Assignment of Note for Purchase Price—Effect of Lien on Subsequent Mortgage.—An assignment of a note for the purchase price of personalty, the seller retaining the title thereto, until such price is paid, vests the title in the assignee until the purchase price is paid, and such title is superior to the lien of a subsequent mortgage, although the assignee bought the property from the original purchaser after the execution of the mortgage, and took a bill of sale thereto, containing a stipulation that the title was conveyed subject to liens of record. (Ga.) *Townsend v. Southern Product Co.*, 340.

Dangerous Articles.

23. **SALES OF DANGEROUS ARTICLES**—Liability of Retailer. A merchant who buys in the open market stove polish which pur-

ports to be safe and proper for use, and sells it at retail for a purpose for which it is apparently intended, is not liable, in the absence of negligence, if it turn out that the article is not adapted to the use, and causes injury by reason of its explosive nature. (Mich.) *Clement v. Rommeck*, 695.

SEARCH-WARRANT.

JUDGMENTS—Res Judicata—Search-warrant Proceedings.—If rival claimants to a search-warrant proceeding appear, employ counsel, and submit the issue of ownership upon evidence produced pro and con, the finding of the magistrate is conclusive until reversed, and amounts to an adjudication, although, strictly speaking, such claimants are not parties to the action. (Iowa) *Montgomery v. Alden*, 648.

SEDUCTION.

1. **SEDUCTION—Evidence of the Consent of the Prosecutrix to have Sexual Intercourse with Another.**—In a prosecution for seduction, evidence that the prosecutrix consented to have sexual intercourse with a witness under examination is not admissible, the act not having been consummated. (Ala.) *Knight v. State*, 58.

2. **SEDUCTION.—Evidence of the General Character of the Prosecutrix for Chastity** is admissible where evidence has been offered tending to impeach her character for chastity. (Ala.) *Knight v. State*, 58.

3. **SEDUCTION—Question for the Jury.**—If the prosecutrix described how the act was accomplished, it is for the jury to determine from the evidence whether she finally yielded under temptation or otherwise, and the court should not charge the jury to find for the defendant. (Ala.) *Knight v. State*, 58.

SETOFF AND COUNTERCLAIM.

COUNTERCLAIM, One Allowance upon Precludes All Further Recovery.—If the purchaser of property gives several promissory notes for the purchase price of merchandise, and, being sued upon one of such notes, pleads by way of counterclaim that the merchandise was defective and unsuitable, and in such action is allowed damages based on his counterclaim, he cannot, when sued upon one of the notes, set up substantially the same counterclaim. (N. C.) *Cass Manufacturing Co. v. Moore*, 983.

SHERIFFS.

See Attachment, 5.

SLEEPING-CAR COMPANIES.

See Carriers, 25, 26.

STATUTES.

Title of Act.

1. **CONSTITUTIONAL LAW—Title of Statute.**—The title, "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records," complies with the constitutional provision that "every act shall embrace but one subject, which shall be expressed in its title," and under this

title provision may be made for a proceeding to establish and quiet the title to real property in all cases of the loss or destruction of public records by fire, flood, or earthquake, without naming any person as defendant, and though there is no assault upon or dispute respecting the title, and also providing for modes of procedure and means of serving process not provided for in other actions. (Cal.) *Title and Document etc. Co. v. Kerrigan*, 199.

Enactment and Proof Thereof.

2. **STATUTES—Proof of Passage.**—The only evidence to which recourse may be had in determining whether a bill has been duly enacted into a law is the duly authenticated enrolled bill approved by the governor, and the legislative journals. (Neb.) *State v. Mickey*, 894.

3. **STATUTES—Authentication—Proof of Passage.**—A law cannot be established by the certificates of the clerical officers of each branch of the legislature, made after the final adjournment of the session for the purpose of showing that such law was duly passed and authenticated. (Neb.) *State v. Mickey*, 894.

4. **CONSTITUTIONAL LAW—Enactment of Statutes.**—Under a constitutional provision that the presiding officer of each House of the legislature shall sign all bills passed thereby, a bill not thus authenticated does not become a law. (Neb.) *State v. Mickey*, 894.

Repeal.

5. **STATUTES—Effect of Repeal on Pending Action.**—When a right of action not existing at the common law is given by statute, a repeal of the statute without a saving clause takes away the right of action in pending causes which have not proceeded to final judgment. (Ind.) *Taylor v. Strayer*, 469.

STREET RAILWAYS.

See Carriers, 13-18.

SUCCESSION.

See Descent.

Note.

Sureties, appeal by from judgments against their principals, 752-754.

TAXATION.

In General.

1. **TAXATION OF MINING PROPERTY, Title to Which Remains in the United States.**—A statute may authorize the taxing of mining property which has not been patented, and the title to which remains in the United States, and the right to the possession in the property passes to the purchaser at the tax sale. (Colo.) *Wood v. McCombe*, 269.

Inheritance Tax.

2. **TAXATION—Inheritance Tax—Situa of Property.**—Mortgages, notes and land contracts representing property situated in one state, owned by and in the possession of a nonresident at the time of his death in another state, are subject to a succession or inheritance tax imposed by the statute of the former state. (Mich.) *In re Rogers' Estate*, 677.

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Tax Collectors.

3. **TAX COLLECTORS—Duty to Pay Over Taxes Collected.**—A tax collector must pay over to the proper authorities all funds collected as taxes which come into his hands officially, and it is immaterial whether the tax collected by him is a constitutional tax, or whether it is illegal or void, or improperly collected. (Miss.) *Adams v. Saunders*, 720.

4. **TAX COLLECTORS—Liability on Bonds.**—A tax collector and his official bondsmen are liable for money collected by him as taxes, although he had no authority to collect it. (Miss.) *Adams v. Saunders*, 720.

Tax Sales.

5. **TAX TITLE, Purchase by the State—Notice of Expiration of Time for Redemption.**—A provision of the statute requiring persons purchasing at a tax sale to give notice of the expiration of the time to redeem applies when the state, as well as when a private individual, is a purchaser. (Cal.) *Johnson v. Taylor*, 181.

6. **TAX SALES, Redemption from—Conflict of Laws.**—Ordinarily, the time of redemption from a tax sale is governed by the law in force when it was made. (Cal.) *Johnson v. Taylor*, 181.

7. **TAX SALES—Constitutional Law—Statute Attempting to Change the Time of Redemption.**—If the statute existing when a tax sale is made gives the property owner the right to redeem until the notice therein prescribed of the expiration of the time for redemption is given, a subsequent statute attempting to dispense with such notice is unconstitutional. (Cal.) *Johnson v. Taylor*, 181.

TELEGRAPHS AND TELEPHONES.*Duty to Furnish Service.*

1. **TELEPHONE COMPANIES—Nonpayment of Dues—Duty to Furnish Service.**—If a telephone company cuts out a subscriber for nonpayment of dues on one contract of service, it must reinstate that service for him upon tender of the amount due, and it cannot coerce payment of the amount due on another and separate contract for telephone service with his wife by demanding that that amount be paid before it will reinstate the other service. (Miss.) *Cumberland Tel. & Tel. Co. v. Hobart*, 702.

2. **TELEPHONE COMPANIES—Wrongful Refusal of Service—Damages.**—If a telephone company cuts out a subscriber and wrongfully refuses to reinstate the service for him, it is liable not only for actual damages, but also for reasonable damages for the inconvenience and annoyance caused him in being wrongfully deprived of the use of the telephone. (Miss.) *Cumberland Tel. & Tel. Co. v. Hobart*, 702.

Damages for Mental Anguish.

3. **TELEGRAPH COMPANIES.**—Under the Mental Anguish statute of Arkansas a recovery may be had against a telegraph company for the negligent failure to deliver a telegram relieving mental anguish or suffering. (Ark.) *Western Union Tel. Co. v. Hollingsworth*, 105.

4. **TELEGRAPH COMPANIES—Mental Anguish.**—Anguish over imaginary situations, worry and anxiety over business matters, inconvenience and annoyance over the affairs of life, do not amount to mental anguish as a recoverable element against telegraph companies.

for negligence in the transmission of messages. Such element is limited to social and personal matters, as contradistinguished from business transactions, and contemplates suffering in mind over the real ills, sorrows and griefs of life, and such suffering as would reasonably be contemplated to flow from the failure to acquaint the person with the tidings sought to be conveyed. (Ark.) Western Union Tel. Co. v. Shenep, 145.

Conflict of Laws.

5. **CONFLICT OF LAWS—Telegraph Corporations.**—If a Message is Delivered to a Telegraph Corporation in One State to be Transmitted to Another, the liability of the corporation thereunder must be determined by the laws of the former state. (N. C.) Johnson v. Western Union Tel. Co., 961.

8. **CONFLICT OF LAWS—Telegraph Corporations.**—Mental Suffering not being allowed as an element of damages in Virginia, one who delivers a message to a telegraph corporation in that state to be transmitted and delivered in North Carolina cannot, on the breach of the contract, recover thereon in the latter state for mental suffering, though such a recovery is permitted by the laws upon like contracts made therein. (N. C.) Johnson v. Western Union Tel. Co., 961.

TIMBER.

See Vendor and Vendee, 4.

TORTS.

See Release.

TRADE UNIONS.

TRADE UNIONS—Contempt—Violation of Injunction.—If an injunction is granted restraining the members of a trade union from intimidating, or unlawfully interfering with, the employes of a certain company against whom a strike is on, such injunction is violated by the president of such union saying to a workman, as he was being escorted through a crowd by a policeman, "I see you are still doing your dirty work," and such act renders such president guilty of a contempt of court. (Mich.) Ideal Mfg. Co. v. Ludwig, 656.

TRAILING BY DOGS.

See Criminal Law, 2, 3.

TRIAL.

Issues and Findings.

1. **APPEAL AND ERROR—Objection to the Form of Presenting Issues.**—The trial court need not submit issues in any particular form. If they are framed so as to present the material matters in dispute and to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of the statute as presenting the issues is fully met. (N. C.) Clark v. Patapsco Guano, 931.

2. **APPEAL AND ERROR.**—A party is not entitled to have an issue presented to the jury respecting matter not pleaded. (N. C.) Clark v. Patapsco Guano Co., 931.

3. **TRIAL—Issues Presented to the Jury, When Sufficient.**—If, under the issues presented to the jury by the court, each party has an opportunity to offer evidence bearing upon every phase of the controversy, then the issues so presented are sufficient. (N. C.) E. F. Main Co. v. Field, 956.

4. **TRIAL—Issues Which Should be Submitted.**—Those material matters which are alleged on one side and denied on the other should be submitted in the form of issues to the jury, and this applies to new matter alleged in the answer and not mentioned in the complaint. (N. C.) E. F. Main Co. v. Field, 956.

5. **PRACTICE.—The Failure to Find upon Certain Issues Made by the Pleadings** does not entitle a party to a reversal if other findings show that the judgment must have been against him, even had findings been made in his favor on the other issues. (Cal.) Union Collection Co. v. Buckman, 164.

Instructions.

6. **INSTRUCTIONS—Consideration of as a Whole.**—It is generally impossible to state all of the case in one instruction; and if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others. (Ark.) St. Louis etc. Ry. Co. v. Graham, 112.

7. **INSTRUCTIONS.—It is not Reversible Error** to give an instruction which is in general terms accurate, but which lacks an explanation fitted to the facts to make it entirely accurate in the case at bar, if the explanation is not requested and the attention of the court is not called to evidence requiring it. (Ark.) St. Louis etc. Ry. Co. v. Graham, 112.

8. **JURY TRIAL—General Charge in Favor of the Defendant, When Properly Refused.**—A general affirmative charge cannot be given when the evidence affords an inference adverse to the party requesting the charge. (Ala.) Hargrove v. State, 60.

9. **APPEAL—Instructions Correct as Whole.**—If the instructions given are correct as a whole, and fully state the law of the case, error cannot be predicated on a single sentence or clause of such instructions. (Neb.) Junod v. State, 890.

See Criminal Law.

TROVER AND CONVERSION.

1. **TROVER AND CONVERSION—Shares of Corporation Stock.**—Trover will lie for the wrongful conversion of shares of corporate stock. (Neb.) Herrick v. Humphrey Hardware Co., 917.

2. **TROVER AND CONVERSION—Shares of Corporate Stock.**—Any act of dominion wrongfully exercised over another's property, in denial of his right or inconsistent with it may be treated as a conversion, and this rule applies to shares of corporate stock. (Neb.) Herrick v. Humphrey Hardware Co., 917.

3. **CONVERSION OF CORPORATE STOCK.**—If, under its by-laws, it is necessary that a transfer of its stock be made on the books of a corporation, and it wrongfully refuses to make such transfer, such refusal is a conversion of the stock. (Neb.) Herrick v. Humphrey Hardware Co., 917.

4. **TROVER AND CONVERSION—Bill of Sale as Evidence.**—If, in an action in trover and conversion, one of the questions at issue is the bona fide transfer of the property before attachment, evidence of the record of a bill of sale of such property is properly admissible,

though it is not required to be recorded, as showing what the parties actually did and the manner in which they did it. (Mont.) *Gehlert v. Quinn*, 864.

Note.

Trustees, appeals by, and the right to prosecute, 757.

TRUSTS.

1. **TRUSTS—Parol Evidence to Establish.**—An express or direct trust cannot be established by parol evidence. (Colo.) *Kinley v. Kinley*, 261.

2. **RESULTING TRUST—Purchase by Husband with Wife's Funds.**—Where a man purchased land with his wife's money, took the title in his own name, and assured her that he had arranged his affairs to protect her, she may assert her rights in the property after his death. He was in effect her trustee, and the statute of limitations will not commence to run until there has been a repudiation of the trust, nor does it come within the statute requiring all express trusts to be proved by writing. (Iowa) *Smith v. Smith*, 581.

UNKNOWN CLAIMANTS.

See Quieting Title.

VALUE OF PROPERTY.

See Evidence, 13, 14.

VENDOR AND VENDEE.

In General.

1. **VENDOR AND VENDEE—Duty of Delivering Possession.**—It is the duty of a vendor either to put his vendee in possession of, or to point out the boundary lines of, the lands conveyed, or, at least, to permit him by a proper survey to ascertain the correct boundary. (Ala.) *Hays v. Bouchelle*, 64.

2. **CONVEYANCE—Recovery of Payments by Vendee.**—Where the vendor of land, because of the default of the vendee in his payments, rescinds the contract and resumes possession of the premises, in which the vendee acquiesces, the contract is abrogated completely, and the vendee may recover the money paid under it, regardless of false representations on the part of the vendor in making the sale. (Iowa) *Pedley v. Freeman*, 557.

3. **CONVEYANCE—Rescission—Inconsistent Remedies.**—A petition by a vendee of land which sets forth the essence of a demand for a rescission of the contract of sale and asks for a recovery of the money paid and a cancellation of the notes given for deferred installments, and an amendment thereto which pleads a rescission by the vendor and asks judgment for a return of the advance payment, do not present inconsistent remedies between which an election may be required. (Iowa) *Pedley v. Freeman*, 557.

Sale of Timber.

4. **STANDING TIMBER SALES—Time in Which to Remove.**—Under a deed to the standing timber on separate tracts of land providing that it shall remain in force as to each separate tract until one year after the vendee begins to cut timber therefrom, he is required to begin cutting within a reasonable time, as shown by the

evidence, after the execution of the deed, notwithstanding that it grants a right of way, unlimited as to time, over all the separate tracts of land, for the removal of the timber therefrom, and from the adjacent lands of the purchaser. (Miss.) *Hall v. Eastman etc. Co.*, 709.

Vendor's Lien.

5. **VENDOR'S LIEN**—Limitation of Actions.—The ten year statute of limitations of Alabama does not apply to suits to enforce vendor's liens. (Ala.) *Reynolds v. Lawrence*, 78.

6. **PRACTICE**—Joinder of Parties.—The original purchaser and all subpurchasers may be joined in a suit to enforce a vendor's lien. (Ala.) *Reynolds v. Lawrence*, 78.

See Dower, 1.

VENUE.

1. **JURISDICTION, Loss of by Change of Venue.**—When, upon application duly made, a cause is transferred to another judge for trial, the transferring judge loses jurisdiction and cannot afterward make further orders. (Mo.) *Priddy v. Boice*, 762.

2. **CHANGE OF PLACE OF TRIAL, Application for must be Supported by Evidence.**—If an application is made to change the place of trial to another division of the court on the ground that all the judges are prejudiced, and the application being brought on for hearing before one of the judges, the moving parties decline to offer evidence on the ground that he will not consider it, notwithstanding he is present and offers to hear such evidence, he may properly deny a change of the place of trial as to all the judges other than himself. (Mo.) *Priddy v. Boice*, 762.

3. **CONSTITUTIONAL LAW**—Jury Trial—Venna.—A statute providing that larceny in a railroad car en route through the state may be prosecuted in any county through which the car passes is void as being in violation of a constitutional guaranty of trial by jury in the county where the alleged crime was committed. (Mich.) *People v. Brock*, 684.

Note.

Voluntary Conveyances, are not conclusively presumed to be fraudulent as against creditors, 553.

burden of proof respecting, 553.

cases holding to be conclusively presumed to be fraudulent as against creditors, 553.

subsequent creditors, how affected by, 554.

VOTING MACHINES.

See Elections.

WASTE.

VENDOR AND VENDEE, Right of the Former to Enjoin Waste.—If a vendor has a lien for unpaid purchase money, he is entitled to enjoin the cutting of timber. (Ala.) *Reynolds v. Lawrence*, 78.

WATERS AND WATERCOURSES.

Adverse User of Water Right.

1. **WATER RIGHTS**—Adverse User.—If one person and his decessors have used the water of a stream for forty years adverse

to the alleged rights of another and his grantor, the former gains an indefeasible title to such use. (Mont.) *Pew v. Johnson*, 852.

Conveyance of Water Right.

2. **WATER RIGHTS—Conveyances—Effect.**—If the father of the plaintiff's grantor merely permitted his son to use certain water rights for the irrigation of the land conveyed to plaintiff, the conveyance does not carry a grant to plaintiff of the right to use such water, as an appurtenance to the land. (Mont.) *Pew v. Johnson*, 852.

Appropriation of Surface or Waste Waters.

3. **WATERS AND WATER RIGHTS—Appropriation of Surface Water.**—If one owner, by constructing a ditch upon his own land parallel with the boundary line between himself and his adjoining owner, has for a number of years intercepted the surface drainage from the adjoining owner's land and used it for irrigation purposes, this does not constitute a valid appropriation of such water, so as to prevent the adjoining owner from constructing on his own land a ditch parallel with the other, thus intercepting such surface water and carrying it around the land of the first ditch owner to irrigate another tract of land of the adjoining owner; and it is immaterial that the latter owner has conditionally sold the adjoining tract, and has with the consent of his vendee continued to use such water upon his other tract. (Colo.) *Burkart v. Meiberg*, 279.

4. **WATER AND WATER RIGHTS—Waste Water—Appropriation.**—Surface water, so long as it remains on the lands of a person and is by him used for irrigation purposes, is not waste water, and does not, in any event, become such until it has escaped and reached the land of another, and until then, the latter cannot make a valid appropriation of it. (Colo.) *Burkhart v. Meiberg*, 279.

Pollution of Waters.

5. **LIMITATION OF ACTIONS to Recover Damages for the Pollution of Watercourses.**—Under subdivision 6 of section 2806 of the Code of Alabama of 1896, a riparian proprietor is not entitled, in an action to recover damages for the pollution of a stream, to recover for any damages accruing more than one year prior to the commencement of the action, but large latitude and discretion are allowed to the jurors in the separation of damages accruing within twelve months from those suffered before that time. (Ala.) *Tutwiler Coal etc. Co. v. Nichols*, 34.

6. **EVIDENCE in an Action to Recover Damages for the Pollution of a Watercourse—Limitations of Actions.**—Though a riparian proprietor is not entitled to recover damages for the pollution of a watercourse except for one year next before the commencement of the action, yet evidence of the condition of the stream both prior to that year and subsequently to the commencement of the suit is relevant and competent for the purpose of showing the effect of the deposits on the land and in the river. (Ala.) *Tutwiler Coal etc. Co. v. Nichols*, 34.

7. **EVIDENCE of Crops Raised on Land and Their Value is admissible in an action to recover damages for the pollution of a watercourse by casting debris therein, as tending to show the nature and character of the land and what it is adapted to, and thereby shedding light on its value.** (Ala.) *Tutwiler Coal etc. Co. v. Nichols*, 34.

8. **EVIDENCE of the Odor Given to a Watercourse by deposits made therein is admissible in an action to recover damages for its pollution.** (Ala.) *Tutwiler Coal etc. Co. v. Nichols*, 34.

9. **DAMAGES, Fish in Stream as Adding to.**—In an action by a riparian proprietor to recover for the pollution of a watercourse, it is admissible for him to show that the fish in the stream had decreased and his catch thereof had become less, though he has no title in the fish until caught. (Ala.) Tutwiler Coal etc. Co. v. Nichols, 34.

10. **DAMAGES—Evidence Respecting Lands not Injured.**—In an action to recover damages for the pollution of a watercourse, a deed conveying land to the plaintiff is admissible, though such land is not touched by the river, if it adjoins other lands of the plaintiff and the whole forms one farm and the river flows through each of the other tracts. (Ala.) Tutwiler Coal etc. Co. v. Nichols, 34.

11. **JURY TRIAL—Abstract Instructions.**—A charge which is abstract may, for that reason, be properly refused. Hence it is not error to refuse to charge a jury that if the plaintiff's fish-traps were so constructed as to prevent the passage of fish up the stream, he cannot recover, there being no evidence offered by either party respecting the manner of the construction of such traps. (Ala.) Tutwiler Coal etc. Co. v. Nichols, 34.

12. **JURY TRIAL—Instruction as to Damages, When Properly Refused.**—In an action by a riparian proprietor to recover damages for the pollution of a watercourse, it is not error to refuse to charge the jury that if they believe from the evidence that prior to August, 1901, the plaintiff's land had been injured by deposits and the waters of the river had been rendered as impure as they were when the suit was brought, the plaintiff cannot recover. (Ala.) Tutwiler Coal etc. Co. v. Nichols, 34.

13. **DAMAGES—Jury Trial—Instructions as to Excluding Evidence of Crops, When Should be Given.**—An instruction that if the jury believe from the evidence that the injury to plaintiff's land was permanent, there can be no recovery by him, so far as his lands are concerned, for the loss of his crops, but only for the permanent injury to his lands, should not be refused, where there was no evidence that the plaintiff lost the crop by deposits or overflow, but the tendency of the evidence was to show that by deposits and overflow the land was rendered less fertile and productive and its yields diminished, the action being one to recover damages for the pollution of a watercourse by the depositing of debris therein. (Ala.) Tutwiler Coal etc. Co. v. Nichols, 34.

Obstruction of Waters.

14. **WATERS.**—A Railroad Company does not Owe to the Owner of Real Property adjacent to its right of way the duty of providing ditches sufficient to collect and carry off all surface water that comes down from the land above in its natural flow. (N. C.) Greenwood v. Southern Railway Co., 967.

15. **WATERS.**—The Lower Proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom. (N. C.) Greenwood v. Southern Ry. Co., 967.

16. **WATERS.**—A railroad corporation is not liable for not keeping open side ditches constructed by it for the purpose of diverting and carrying off water coming down from above. Though it allows such ditches to fill up and thereby lets water from land above sweep across its track and flow in its natural course upon lands below, the owner of the latter cannot recover damages, there being no charge that the railroad by its track obstructed or diverted the natural flow of the stream. (N. C.) Greenwood v. Southern Ry. Co., 967.

17. EVIDENCE, What Sufficient to Show Injury from Maintaining a Dam.—If there is testimony showing that, before the erection of a cross-dam complained of, the waters of a stream were accustomed to pass down a natural depression without injuring the plaintiff's land or his dam, but that after the erection of such cross-dam the plaintiff's dam was broken three times during freshets and had never been broken before, this is sufficient to support a finding that the plaintiff and his land were injured by such cross-dam, and such testimony is therefore competent and relevant. (N. C.) *Clark v. Patapsco Guano Co.*, 931.

18. WATERS, Right of One Proprietor to Obstruct to the Injury of Another.—A proprietor cannot legally obstruct what is known as the flood channel of a river by erecting a dam across it, and thereby forcing the water back upon the dam of another riparian proprietor to his injury. (N. C.) *Clark v. Patapsco Guano Co.*, 931.

19. WATERS, Obstruction of Flood Channel Adjacent to.—Flood channels must be considered as part of a stream, and no obstructions or structures of any kind can be placed in their beds which will have a tendency to dam the waters back upon another riparian proprietor. (N. C.) *Clark v. Patapsco Guano Co.*, 931.

20. WATERS.—Generally, water which in times of freshets overflows the bank of a stream and is accustomed to flow over adjacent low land in a defined stream is to be treated as a watercourse rather than as surface water, and a riparian owner is not allowed to stop the flow by erecting barriers to the injury of another. (N. C.) *Clark v. Patapsco Guano Co.*, 931.

21. WATERS, Joinder of Causes in Producing Injurious Result.—The fact that other causes may have concurred with the defendant's wrong in producing an injury by throwing water upon plaintiff's land does not relieve the defendant from liability. (N. C.) *Clark v. Patapsco Guano Co.*, 931.

See Drainage.

WILLS

In General.

1. WILLS—Statutory Control Over.—The whole subject of wills is under legislative control, and the statute prescribes the exact conditions upon which an instrument shall be admitted to probate as a last will and codicil, and the courts have no right to dispense with any of these conditions. (Ill.) *Hill v. Kehr*, 425.

2. A WILL may be Defined as any Instrument, executed without the formalities required by law, whereby a person makes a disposition of his property to take effect after his death. (Ind.) *Heaston v. Krieg*, 475.

3. WILL.—It is of the Essence of a Testamentary disposition of property that it be purely posthumous in operation, since during life the intent of the testator must continue ambulatory. (Ind.) *Heaston v. Krieg*, 475.

4. WILL—Contractual Provisions.—No Matter what Name the parties to an agreement may call it, or to what extent there may be contractual provisions in it, yet if a provision of a clearly testamentary character is found in the writing, and it is witnessed in accordance with the requirements of law, it may operate as a will. (Ind.) *Heaston v. Krieg*, 475.

5. WILL.—The Animus Testandi does not Depend upon the maker's realization that the instrument he is executing is a will,

but upon his intention to create a revocable disposition of his property to take effect after his death. (Ind.) *Heaston v. Krieg*, 475.

6. **WILL—Animus Testandi, When Implied.**—Where a writing contains every element of a valid will, and is incapable of operating in any other way, the animus testandi must be implied, and the instrument is not subject to be controlled by parol evidence to show a different intent. (Ind.) *Heaston v. Krieg*, 475.

7. **WILL—Conditions.**—Where an Instrument, testamentary in nature, recites that in consideration of love and affection, and of the legatee caring for and supporting the testator during the rest of his life certain property is given to the legatee, the provision for care and support is not necessarily a condition punctiliously to be performed in every particular to avoid a forfeiture. (Ind.) *Heaston v. Krieg*, 475.

8. **WILL—Conditions are not Favored,** and, in the absence of express terms to that effect, they will not be implied in wills unless the intent is clear. (Ind.) *Heaston v. Krieg*, 475.

9. **WILL—A Writing Susceptible of Being Construed as a will** and also as a deed will be construed to be a will if it is a nullity as a deed. (Ind.) *Heaston v. Krieg*, 475.

10. **WILL—Presumptively a Will Speaks as of the date of the death of the testator.** (Ind.) *Heaston v. Krieg*, 475.

Agreement not to Make.

11. **WILLS—Agreement not to Make.**—The owner of property may make a valid, enforceable agreement binding himself not to dispose of it by will and to permit it to descend according to the laws of intestacy. (Ill.) *Jones v. Abbott*, 412.

12. **WILLS—Consideration of Contract not to Make.**—The compromise of a suit then pending and being defended in good faith constitutes a sufficient consideration for an agreement not to make a will. (Ill.) *Jones v. Abbott*, 412.

Testamentary Capacity.

13. **WILLS—Testamentary Capacity—Belief in Spiritualism.**—If a person is sane on all other subjects, he cannot be pronounced incompetent to make a will because he was an ultraist regarding the doctrines embraced in the articles of faith of a spiritualistic association, and there is no evidence of any insane delusion on his part which cannot be accounted for by reason of his belief in spiritualism. (Ill.) *Owen v. Crumbaugh*, 442.

14. **WILLS—Testamentary Capacity.—Any Mere Mental Aberrations Resulting in the Subnormal Exercises of the Faculties** which do not result in such impairment of the reason, judgment or memory as to render the testator unable to understand the business of making a will and the effect of the disposition to be made of his property will not vitiate the will. (Ill.) *Owen v. Crumbaugh*, 442.

15. **WILLS—An Insane Delusion must be Such an Aberration as Indicates an unsound and deranged condition of the mental faculties as distinguished from the mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence.** A belief which results from a process of reasoning from evidence, however imperfect the process may be or illogical the conclusion, is not insane delusion. (Ill.) *Owen v. Crumbaugh*, 442.

16. **WILLS.—An Insane Delusion is not Established when the court is able to understand how a person, situated as the testator was, might**

have believed all that the evidence shows he did believe, and still have been in the full possession of his senses. (Ill.) *Owen v. Crumbaugh*, 442.

17. **WILLS**—A Belief in Spiritualism cannot be held to be an insane delusion. (Ill.) *Owen v. Crumbaugh*, 442.

18. **WILLS**—A Testator cannot be Held to Have Had an Insane Delusion, Because He Believed that the death of his child had been caused by certain of his relatives through their taking away a cow and rendering it necessary for the child to be fed upon the milk of another cow, if, as a matter of fact, they did take away the cow, and the child subsequently sickened and died, though it further appears he believed that the facts relating to the death of the child had been revealed to him by a spiritual communication. (Ill.) *Owen v. Crumbaugh*, 442.

19. **WILLS**—Insane Delusions.—A Testator's Belief that He was Saved from Harm on Several Occasions by a Guiding Spirit does not establish insane delusions on his part, disabling him from making a will, if the circumstances of his having been in danger, and having escaped therefrom, without injury, were real, and if any delusion existed, it was only in accounting for his preservation. (Ill.) *Owen v. Crumbaugh*, 442.

20. **WILLS**—Insane Delusion Respecting Spiritualism.—A belief on the part of the testator that the spirit of his deceased son and that of other deceased friends held communication with him and also a belief in spiritualistic photography did not show any departure from the usually accepted belief of spiritualistic organizations, and hence is not evidence of an insane delusion. (Ill.) *Owen v. Crumbaugh*, 442.

21. **WILLS**—Insane Delusions.—Evidence of Physicians as to the Effect of a Belief in Spiritualism.—The testimony of physicians that if the testator believed in spiritualism as set out in the hypothetical questions addressed to them, he was insane, amounts to no more than their statement that persons who believe in spiritualism are insane, and does not support a verdict setting aside a will on account of the insanity of the testator. (Ill.) *Owen v. Crumbaugh*, 442.

22. **WILLS** Due to Spiritualistic Belief—Testamentary Capacity.—A testator may think so continually and persistently upon the subject of spiritualism as to become a monomaniac, incapable of reasoning, where this subject is concerned, and in such case a will made in consequence of such monomania is void for lack of testamentary capacity. (Mich.) *O'Dell v. Goff*, 662.

23. **WILLS** Due to Spiritualistic Belief.—A believer in spiritualism may have such extraordinary confidence in spiritualistic communications, whether reaching him through mediums, or directly, that he is impelled to follow them blindly and implicitly, and if so, his free agency is destroyed, and a will made under such circumstances is not the will of the testator, and is not entitled to probate. (Mich.) *O'Dell v. Goff*, 662.

24. **WILLS** Due to Spiritualistic Belief—Undue Influence.—If the evidence in a will contest tends to prove that in making his will the testator was influenced unduly by spiritualistic communications, and that he was a monomaniac upon the subject of spiritualism, the question as to whether such belief overcame the testator's mind and compelled him to make the will in question thus constituting undue influence, is for the jury to determine. (Mich.) *O'Dell v. Goff*, 662.

25. **WILLS**—Testamentary Capacity Spiritualistic Belief.—If a will is contested on the ground of want of testamentary capacity in

the testator, caused by monomania on the subject of spiritualism, the truth or falsity of the spiritualistic faith is not in issue, and evidence that the testator was a monomaniac merely because he believed in spiritualism is not admissible. (Mich.) O'Dell v. Goff, 662.

26. **WILLS—Spiritualistic Belief—Evidence—Insanity.**—If a will is contested on the ground of want of testamentary capacity in the testator, caused by a belief in spiritualism, evidence by one duly qualified that there was nothing irrational from the standpoint of a spiritualist in the belief by the testator that a medium in a trance might do him harm is admissible as tending to remove from the mind of the jury the impression which might otherwise exist that such particular belief was evidence of insanity. (Mich.) O'Dell v. Goff, 662.

27. **WILLS—Evidence of Want of Testamentary Capacity—Belief in Spiritualism.**—In a will contest a witness who has testified to want of testamentary capacity in a testator, caused by his belief in spiritualism, cannot be cross-examined upon the subject of other religious beliefs and their effect on testamentary capacity. (Mich.) O'Dell v. Goff, 662.

28. **WILLS—Insanity—Cross-examination.**—The refusal of the court to compel a witness in a will contest, upon cross-examination, to state which of several circumstances indicating insanity in the testator was, in his judgment, the most significant, is wholly within the discretion of the trial court. (Mich.) O'Dell v. Goff, 662.

29. **WILLS.**—Declarations of a testator tending to prove lack of testamentary capacity, made after the execution of the will, are admissible in evidence. (Mich.) O'Dell v. Goff, 662.

30. **WILL—Testamentary Capacity—Physician as Witness.**—In a proceeding to set aside the probate of a will and to probate in its place a subsequent will, the physician of the testator is incompetent to testify to matters learned through his professional relations with the decedent, although the executor of the prior will waived any objections to such competency. (Ind.) Heaston v. Krieg, 475.

Description of Property.

31. **WILL—Insufficient Description for Grant in Praesenti.**—A writing whereby the beneficiary shall have, at the donor's death, all the property of which she may "die seised" fails to identify any property as the subject matter of a conveyance in praesenti. (Ind.) Heaston v. Krieg, 475.

32. **WILLS, Correcting Description of Property in.**—If there is a misdescription of the subject of a devise, and, after striking out that part of the description which is false, enough remains when read in the light of the circumstances surrounding the testator at the time the will was executed to identify the property he intended to convey, the remaining portion of the description may be so read and the testator's purpose given effect. (Ill.) Douglas v. Bolinger, 409.

33. **WILLS—Devise of Property by Wrong Description, When may be Given Effect upon the Property Intended.**—If a testator owned the west half of the northwest quarter of a section of land and no other portion of such quarter, but in his will he purported to devise the north half of such quarter, the words "north half" may be stricken out as surplusage and the devise given effect as including the west half of that quarter. (Ill.) Douglas v. Bolinger, 409.

Proof of Wills.

34. **WILLS, Proof of by Proof of Codicil.**—If the testimony of a subscribing witness to a codicil is sufficient to entitle it to probate, such testimony also establishes the will. (Ill.) Hill v. Kehr, 425.

35. **WILLS, Essentials of.—To Authorize the Admission of a Will to Probate by the County Court,** proof, must be made by at least two subscribing witnesses that they were present and saw the testator sign the will or codicil in their presence, or acknowledge the same to be his act or deed, and that they believed him to be of sound mind and memory at the time of such signing or acknowledging, but on an appeal from an order of the county court denying the probate, the proponent may establish the will by any evidence competent to establish a will in chancery. (Ill.) Hill v. Kehr, 425.

36. **WILLS—Absence of Belief by a Subscribing Witness Respecting the Soundness of Testator's Mind and Memory.**—If one of the subscribing witnesses whose testimony is essential to the probate of a will testifies that he had no reason to question the capacity of the testatrix because he did not know her, and it appears that he had no opinion on the subject, the will is not entitled to probate. (Ill.) Hill v. Kehr, 425.

Contest of Will.

37. **WILLS—Evidence of Paternity of Contestant.**—A deposition filed in a divorce suit brought by the testator against the contestant's mother, in which the deponent testifies to her admission of her infidelity before the contestant was born, is admissible to prove that the testator had good grounds to doubt the paternity of his child. (Mich.) O'Dell v. Goff, 662.

38. **WILL CONTEST—Estoppel on Appeal.**—If the contestant of a will is required, by an order of court, made on the motion of the contestees, to attach to his complaint a copy of the will which he propounds for probate, they are estopped on appeal to deny that the copy is a proper exhibit. (Ind.) Heaston v. Krieg, 475.

39. **WILL CONTEST.—A Copy of a Subsequent Will is a proper exhibit to a complaint to annul the probate of a prior will if the plaintiff propounds such subsequent will for probate.** (Ind.) Heaston v. Krieg, 475.

Relief from Probate for Fraud.

40. **WILLS—Probate of—Relief from for Fraud.**—A judgment admitting a copy of a lost will to probate, and obtained by false and fraudulent misrepresentations as to jurisdictional facts may be set aside in a proper proceeding instituted for that purpose by an heir of the testator, in the court rendering such judgment. (Ga.) Davis v. Albritton, 352.

Widow's Election.

41. **WILLS—Election by Widow.**—A widow is held to have chosen under her husband's will, unless within one year from the date of its probate she files her declaration of election to take under the law. (Ind.) Whitesell v. Strickler, 524.

42. **WILLS—Widow's Election Procured by Fraud or Undue Influence.**—A complaint alleging that the plaintiff is a widow; that her husband devised to her all his property; that her daughter, her daughter's husband, who was an attorney and the circuit judge induced her to renounce the provisions of her husband's will by representing that it was void for want of testamentary capacity, and that she

subsequently found the representations false and the will not void, states a cause of action to avoid her election to take under the law instead of under the will. (Ind.) Whitesell v. Strickler, 524.

43. **WILL—Rescission of Widow's Election—Limitation of Actions.**—Where a widow has renounced the provision which her husband made for her in his will, and elected to take under the law, she can maintain an action to rescind such election, for fraud, and undue influence, and again place herself under the will, within the general statutory period of six years. (Ind.) Whitesell v. Strickler, 524.

Note.

Wills, forged, what amounts to the uttering of, 317.

WITNESSES.

See Evidence.

WORDS AND PHRASES.

WORDS AND PHRASES.—The Word "Paid" is often loosely used, and always liberally construed. (Ind.) Heaston v. Krieg, 475.

WORK AND LABOR.

See Liens.





